No._____

Supreme Court, U.S.
FILED

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In The Supreme Court Of The United States

OCTOBER TERM, 1997

SANDRA K. KERBY,

Petitioner,

vs.

SOUTHEASTERN PUBLIC SERVICE AUTHORITY, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err in deciding that coverage under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., applies only on those sites which are physically contiguous with, and actually touch, the water?

PARTIES BELOW

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Decision of Administrative Law Judge Daniel A. Sarno, Jr., dated February 9, 1996: Kerby v. Southeastern Public Service Authority (ALJ No. 95-LHC-508) (Appendix C).

Decision of the Benefits Review Board, United States Department of Labor, dated February 26, 1997: Sandra K. Kerby v. Southeastern Public Service Authority and William C. Rodriquez v. Southeastern Public Service Authority, 31 BRBS 6 (1997) (BRB No. 96-0705) (Appendix B).

Decision of the United States Court of Appeals for the Fourth Circuit: Kerby v. Southeastern Public Service Authority of Virginia, Nos. 97-1323, 97-1373, 1998 U.S. App. LEXIS 2965 (4th Cir. Feb. 24, 1998) (Appendix A).

STATEMENT OF JURISDICTION

This case arose under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. (the "LHWCA" or the "Act"). The Administrative Law Judge had jurisdiction to hear the claim pursuant to 33 U.S.C. §§ 919 (c) & (d). The Benefits Review Board had jurisdiction to hear the appeal from the Administrative Law Judge's decision, pursuant to 33 U.S.C. § 921 (b) (3). Jurisdiction was proper before the United States Court of Appeals for the Fourth Circuit upon petition for review from the Benefits Review Board, pursuant to 33 U.S.C. § 921 (c).

The United States Court of Appeals for the Fourth Circuit rendered its decision in this case on February 24, 1998. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fourth Circuit by way of *certiorari* pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

This case involves the interpretation of 33 U.S.C. § 903 (a), which states as follows:

Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

STATEMENT OF THE CASE

Petitioner, Sandra K. Kerby, suffered an injury on August 1, 1994, while working as a crane operator for the Respondent, Southeastern Public Service Authority of Virginia, at its power plant in Portsmouth, Virginia. The site on which she was injured is owned by the United States Navy and lies within the Norfolk Naval Shipyard ("NNS"). The portion of NNS that is contiguous with the Elizabeth River is separated from the power plant only by a privately owned railroad spur bordered by a chain link fence on either side. The power plant provides steam and electricity to NNS for use in heating water for shore facilities and

ships. The electricity generated by the power plant goes to a switchyard which is operated by NNS, and which is physically located on the power plant site.

Petitioner sought compensation for her work-related injury under the LHWCA. The Respondent disputed the existence of jurisdiction under the Act. The matter was heard before Administrative Law Judge Daniel A. Sarno, Jr. of the United States Department of Labor ("Judge Sarno"). At the hearing, the parties stipulated that Judge Sarno's jurisdictional determination in another case pending before Judge Sarno, William C. Rodriquez v. Southeastern Public Service Authority of Virginia, would be controlling on the issue of jurisdiction in the matter at bar. (Appendix C). On February 8, 1996, Judge Sarno issued a Decision Order – Awarding Benefits in the Rodriquez case, in which he held that the claimant therein, who also suffered an injury while working for the Respondent at its power plant, met the jurisdictional requirements of the Act. Rodriquez v. Southeastern Public Service Authority, (ALJ Nos. 94-LHC-2989, 94-LHC-2990, February 8, 1996). (Appendix D). On the following day, Judge Sarno issued a Decision and Order – Granting Benefits in the present case, in which he found that the Petitioner also met the jurisdictional requirements of the

Act, consistent with the parties' stipulation. Kerby v. Southeastern Public Service Authority, (ALJ No. 95-LHC-508, February 9, 1996). (Appendix C).

On appeal to the Benefits Review Board, the present case was consolidated with Rodriquez. (Appendix I). In an opinion dated February 26, 1997, the Benefits Review Board affirmed Judge Sarno's decision that the claimants met the requirements of the "status" test under the Act, but reversed his decisions that the claimants were injured on a maritime "situs". Kerby and Rodriquez v. Southeastern Public Service Authority, 31 BRBS 6 (1997) (BRB No. 96-0705). (Appendix B).

On petition for review to the Court of Appeals for the Fourth Circuit, the court, in a three-paragraph *per curiam* decision, determined that the Petitioner "failed to establish that her injury had occurred on a covered situs, as required by the LHWCA."[1] Kerby v. Southeastern Public Service Authority, Nos. 97-1323, 97-1373, 1998 U.S. App. LEXIS 2965 (4th Cir. Feb. 24, 1998).

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[1] The Rodriquez case was settled while it was pending before the Court of Appeals for the Fourth Circuit, after which Rodriquez withdrew as a party to the appeal. (Appendix G). Accordingly, Rodriquez is not a party to the immediate petition.

Petitioner now seeks the review of this Honorable Court.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit Court of Appeals has entered a decision in this case which conflicts with the decisions of other United States courts of appeals on the issue of jurisdiction under the Longshore and Harbor Workers' Compensation Act.

According to 33 U.S.C. § 903 (a), a maritime employee is entitled to coverage under the Act where he or she is injured "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903 (a) ("Section 903 (a)"). The descriptive parenthetical language which now appears in Section 903 (a) was added in 1972, when Congress overhauled the Act to provide inland application to workers who travel in and out of coverage. The amendment to Section 903 (a), according to the Senate and House Committee Reports, was intended "to permit a uniform compensation system to

apply to employees who would otherwise be covered by this act for *part* of their activity." S. Rep. No. 92-1125, 92nd Cong., 2d Sess. 12-13 (1972) (emphasis added); H.R. Rep. No. 92-1141, 92nd Cong., 2d Sess. (1972) (emphasis added), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4707-08. Congress sought to ensure "that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." Id. Thus, in amending the Act, Congress broke with the tradition of applying the strict locality test of admiralty tort jurisdiction to limit coverage under the Act.

The expanded definition of "navigable waters" to include such a large geographic area made it necessary for Congress to describe affirmatively the class of workers entitled to coverage. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 262 (1977). Thus, Congress changed what had been essentially only a "situs" test to one which considers both the "situs" of the injury and the "status" of the injured employee. Caputo, 432 U.S. at 264. The "status" test is governed by the definition of "employee" found in Section 902 (3) of the Act, and is not at issue in

this Petition.[2] The "situs" test, which is at issue in the present case, is governed by Section 903 (a), and focuses on the location at which the injury occurs and its relationship to the navigable waters of the United States.

Although the circuit courts consistently have held that jurisdiction under the Act is to be determined based upon a consideration of both "situs" and "status", they have created divergent tests for determining whether a given location qualifies as a covered "situs". In particular, the struggle has centered on the meaning of the phrase "other adjoining area" in the amended language of Section 903 (a). The circuits are in disagreement as to the breadth of coverage created by this language.

In Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978), the Ninth Circuit Court of Appeals interpreted the phrase "other adjoining area" as describing a "functional relationship that does not in all cases depend upon physical contiguity." 568 F.2d at 141. To determine whether a particular site qualifies as a covered situs, the

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[2] In a footnote in its opinion, the Fourth Circuit stated that because its holding that Kerby had failed to establish that her injury occurred on a covered situs was dispositive, it was unnecessary to determine whether Kerby met the status test under the Act. Kerby v. Southeastern Public

court in Brady-Hamilton created a test made up of four factors: (1) the particular suitability of the site for the maritime uses referred to in the statute; (2) whether adjoining properties are devoted primarily to uses in maritime commerce; (3) the proximity of the site to the waterway; and, (4) whether the site is as close to the waterway as is feasible given all of the circumstances. Id. Applying this "functional" test, the Ninth Circuit held that the claim of a gear lockerman who was injured while unloading steel from a truck parked at a gear locker located 2,600 feet north of the edge of the Columbia River and 2,050 feet outside of the entrance gate of the port met the situs requirement under the Act.

The Fifth Circuit followed suit in Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980), cert. denied, 452 U.S. 905 (1981), in which it found that a "gear man" who was injured while working in a gear room located five blocks from the gate of the nearest dock, was injured on a covered situs. Citing its opinion in Alabama Dry Dock & Shipbuilding Co. v. Kineness, 554 F.2d 176 (5th Cir. 1977), the Winchester court held that the physical distance from the water is not the decisive issue on the

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Service Auth. of Va., Nos. 97-1323, 97-2373, 1998 U.S. App. LEXIS 2965 (4th Cir. Feb. 24, 1998).

question of whether a situs qualifies under the Section 903 (a). Instead, according to the court, the question is whether the situs is within a contiguous area used for a purpose delineated in the coverage provisions of the Act. The court stated as follows:

> [W]e . . . reject the idea that Congress intended to substitute for the shoreline another hard line. Growing ports are not hemmed in by fence lines; the Act's coverage should not be either. All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes. The site must have some nexus with the waterfront.

Id. The court rejected the position that the presence of nonmaritime buildings between the point of injury and the waterfront provides an absolute test as to whether coverage exists, reasoning that such a rule would introduce a new fortuity that would frustrate congressional intent. Id. at 513.

Eleven years later, the United States Court of Appeals for the Second Circuit decided the case of Triguero v. Consolidated Rail Corp., 932 F.2d 95, 100-01 (2d Cir. 1991). In that case, the court relied on Winchester

and Brady-Hamilton in support of its holding that a claimant whose injury occurred over a mile from the employer's dockside facility, in a container yard separated from navigable waters by a public street, met the situs requirement of Section 903 (a). The court determined that the distance from a navigable waterway by roads or property boundaries is not dispositive in the situs inquiry. Id.

In sharp contrast to the functional approaches of the Ninth, Fifth and Second Circuits, the Court of Appeals for the Fourth Circuit has created a situs test based on a narrow and restrictive interpretation of the "other adjoining areas" language of Section 903 (a). In Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. 1995), cert. denied, 116 S. Ct. 2570 (1996), the court held that a claimant who suffered an injury at a container repair facility was not injured on a covered situs. The facility had been relocated to an off-terminal site from a site immediately adjoining the terminal, due to the terminal's expansion. Interpreting the term "adjoining" as requiring absolute contiguity, the court stated in Sidwell that "[i]f there are other areas between the navigable waters and the area in question, the latter area simply is not 'adjoining' the waters under any reasonable definition of that term." 71

F.3d 1134, 1138-39. The court rejected the functional approaches of the Ninth and Fifth Circuits,[3] and relied instead upon the "primary" definitions of the term "adjoin" according to Webster's Third New Int'l Dictionary 27 (1993), in formulating its new test. According to the Court, the dictionary definition, which includes "to lie next to", "to be in contact with", to "abut upon", or to be "touching or bounding at some point" supported its determination that absolute physical contiguity was required under the Act. Id. at 1138 (quoting Webster's Third New Int'l Dictionary 27 (1993)).[4]

Although the court in Sidwell acknowledged that "neighboring" and "in the vicinity of" are also "possible" definitions of the term "adjoining", it described these definitions as "secondary". Id. It reasoned that each of Section 903 (a)'s enumerated "areas" "is a discrete structure or facility, the very raison d'etre of which is its

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[3] The court made no reference to the Second Circuit's decision in Triguero.

[4] Although the court also rejected the test set forth in Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629 (3d Cir. 1976) which the Director urged the court to adopt, that case is not relied upon herein, as this Court has criticized Sea-Land as appearing to "essentially discard the situs test." Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 277 n. 40 (1977).

use in connection with navigable waters." Id. at 1139. Thus, according to the Court, an area must be a discrete shoreside structure or facility which is "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel" in order to qualify as an "other area" under the Act. Id.

Soon after its opinion in Sidwell, the Fourth Circuit decided the case of Parker v. Director, OWCP, 75 F.3d 929 (4th Cir. 1996), cert. denied, 117 S.Ct. 58 (1996), overturned on other grounds, Ingalls Shipbuilding v. Director, OWCP, 117 S. Ct. 796 (1997). In Parker, the Fourth Circuit relied on its decision in Sidwell to affirm the denial of coverage to a worker who was injured at his employer's off-terminal facility. The court based its decision on the fact that the situs in question was not located within the boundaries of the terminal and the off-terminal facility was not contiguous to navigable waters. The off-terminal site was located approximately five miles from the terminal. Id. at 931. Applying the "straightforward geographical" test of Sidwell, the court held that because the off-terminal site was neither contiguous with navigable waters, nor touching navigable waters, it was not a maritime situs. Id. at 933. The court rejected the argument that the policy of the Act which favors coverage over non-

coverage requires a more expansive interpretation of the term "adjoining", on the basis that the Third Circuit relied on policy grounds in Sea Land, which was expressly disapproved by this Court. 75 F.3d at 933.

As demonstrated above, it was apparent after Sidwell that the Fourth Circuit's situs test stood in stark contrast to those employed by the Ninth, Fifth and Second Circuits, due to its focus on property divisions as opposed to functional factors. Still, Sidwell left open the possibility that application of its rule might afford coverage based on factors other than property boundaries, as evidenced by the following language in the opinion:

> . . . [A]lthough one might be tempted initially to eschew any reliance on conventional property lines in defining "other adjoining areas," we believe that it is inescapable that some notion of property lines will be at least relevant, if not dispositive, in determining whether the injury occurred within a single "other adjoining area."

Sidwell, 71 F.3d at 1140. This language indicated that property lines would not, in all cases, be dispositive of the situs issue. Therefore, after Sidwell, it remained uncertain

whether the Fourth Circuit would apply its strict contiguity test if other factors existed to show a functional connection between separated properties.

Any doubt which remained after Sidwell as to the severity of the Fourth Circuit's situs test and its potential for producing disparate results was resolved by the decision in the matter sub judice. Here, in an abbreviated, unpublished opinion, the Fourth Circuit held that the existence of a railroad spur between the marine terminal and the power plant, both of which are owned by the United States Navy, created a line of demarcation between maritime and non-maritime property. Accordingly, it is now clear that the Fourth Circuit's test is based solely on property boundaries, and places no relevance upon any functional relationship between the properties in question.

The conflict between the Sidwell rule and those of the other circuits was made even more apparent by the Third Circuit's recent decision in Nelson v. American Dredging Co., No. 96-3724, 1998 U.S. App LEXIS 9695 (3d Cir. May 11, 1998), in which that court specifically rejected the reasoning of Sidwell. The claimant in Nelson was injured while working on a beach reclamation project in Delaware, which consisted of widening the beach by adding sand to it. Id. at 2. The Third Circuit reversed the

BRB's opinion that the situs of the injury did not meet the jurisdictional requirements of the Act. The court had the following to say concerning the BRB's reliance on Sidwell:

> We respectfully decline to adopt this construction of the statute. The structures identified in § 3 (a) which preceded the phrase "other adjoining area" were not referred to in that section as "areas." The Sidwell court opined that by using the term "other adjoining area" the drafters of the amendment thereby were referring back to the enumerated structures; i.e., pier, wharf, dry dock, as areas. But giving the word "area" its plain meaning as we are required to do in construing the statute, we find that it does not denote a building or structure as such, but rather an open space, indeed sometimes within a building or other structure.

Id. at 22. The court went on to note that the definition of "area" does not suggest that the drafters intended that it refer back to and be modified by any of the preceding enumerated sites which happen to be structures. Thus, the

improved beach fit within the plain meaning of the word "area". Id. at 23.

Significantly, unlike the claimant in Sidwell, it is clear that the Petitioner herein would have been covered under the Act upon application of the functional tests delineated by the other circuits. The power plant in the present case is actually owned by the Navy, and is a part of the NNS complex. It provides steam and electricity for exclusive use by NNS at the terminal and on board ships. Thus, the power plant is devoted primarily to uses in maritime commerce and is located as close to the waterway as feasible, as required by Brady-Hamilton. This also evinces a clear nexus between the plant and the waterfront, as required by Winchester and Triguero. Under these tests, therefore, the railroad spur would be viewed as nothing more than a fortuitous separation.

As noted above, the 1972 amendments to the LHWCA were enacted to provide for uniformity of coverage to similarly-situated workers, regardless of the judicial district in which their injuries occur. The Fourth Circuit's unduly restrictive rule flies in the face of this legislative intent, creating disparity in coverage, and adding insult to the injuries sustained by maritime workers within the jurisdiction of the Fourth Circuit. As it stands,

jurisdiction under the Act depends on the judicial district in which the injury occurs as opposed to the relationship of the locus to the navigable waters of the United States. Accordingly, this Court's settlement of the divergence of opinion among the circuits is essential, and will provide much-needed pivotal guidance as to the proper test to be applied to jurisdictional inquiries under the Act.

II. The decision of the Court of Appeals for the Fourth Circuit in this case conflicts with previous decisions of the Fourth Circuit on the issue of jurisdiction under the Act.

The Fourth Circuit's strict contiguity test not only conflicts with the tests applied in the Ninth, Fifth, Second and Third Circuits, it also contradicts previous precedent within the Fourth Circuit.

Before its decision in Sidwell, the Fourth Circuit applied a functional test for determining situs jurisdiction under the Act. In Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978), the court held that a submarine shop located 1,200 feet from the water's edge and a foundry located 3,000 feet from the water's edge satisfied the situs

test because they were "integral parts of the shipyard." Id. at 169. The court focused on the type of work performed on the sites in question, and held that it was not necessary that all of the work performed on the site be devoted to ship related work. Id. at 169 (citing Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 543 (5th Cir. 1976); Dravo Corp. v. Maxin, 545 F.2d 374, 381 (3d Cir. 1976)). Although not specified in the Fourth Circuit's opinion, the facts of the case as set out in the Benefits Review Board's decision in Graham reveal that the foundry in which the injury occurred was located two and one-half blocks from the water's edge and was separated from the water by two public streets. Jones v. Newport News Shipbuilding & Dry Dock Co., 5 BRBS 323, 324-25 (1977), aff'd, Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (1978).

Nine years later, in Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), cert. denied, 485 U.S. 1028 (1988), the Fourth Circuit was again confronted with the situs issue. In Humphries, the claimant, a shipforeman, was injured on a public street while returning to the employer's terminal from a restaurant. The court held that the claimant in Humphries was not entitled to coverage under the Act because (1) his injury occurred well over a

mile from the employer's terminal; (2) the injury occurred along a public highway which did not connect any portions of the employer's terminal or traverse continuous or contiguous terminal areas; (3) although the restaurant from which the claimant was traveling was arguably located in a waterfront area, it was separated from any navigable waterway or maritime terminal by a residential neighborhood; (4) the restaurant was not the closest one to the terminal; and (5) the restaurant was not an integral part of the employer's terminal. Id. at 374-75. In reaching its conclusion, the court stressed that the proper inquiry in determining the situs issue is with respect to the character of the area in which the injury occurs, noting that "[i]t is generally settled that a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime' operation." Id. at 373. (citing Perkins v. Marine Terminals Corp., 673 F.2d 1097, 1101-02 (9th Cir. 1982)). The court acknowledged in its opinion that a "broad interpretation of the maritime situs requirement is warranted on statutory and policy grounds." Humphries, 834 F.2d at 374.

As the foregoing demonstrates, before its decision in Sidwell, the Fourth Circuit broadly interpreted the situs requirement of the Act, and considered factors other than

property boundaries in determining coverage under Section 903(a). Hence, since Sidwell, a discrepancy exists among the cases as to the correct test to be applied. The concurring opinions in Sidwell and Parker highlight this contradiction. In Sidwell, Judge Beaty concurred on the basis that the ALJ properly denied coverage based on its application of the Brady-Hamilton test. He parted from the majority, however, on the requirement that the place of injury actually touch navigable water in order to be considered a maritime situs. Judge Beaty reasoned that the phrase "other adjoining areas" was intended to provide a "description of additional areas that would satisfy the situs test without requiring these additional sites to actually touch navigable waters." Sidwell, 71 F.3d at 1142. He went further to note that "[i]f Congress intended to further limit coverage, there would have been no reason to describe additional covered sites beyond those already enumerated in the statute." Id.

Likewise, in his concurring opinion in Parker, Judge Murnaghan noted that the Sidwell court's interpretation of the phrase "other adjoining area" created a "circuit conflict" with the Fifth Circuit's decision in Winchester. Id. at 935. He stated that the Fourth Circuit's strict interpretation of Section 903 (a) is "entirely at odds with

the meaning that Congress intended [courts] to ascribe to it." Id.. Judge Murnaghan cited the legislative history of the 1972 amendments to the Act, which expresses an unequivocal concern for the lack of uniformity in coverage under the pre-Amendment Act. Id. Additionally, Judge Murnaghan pointed to the policy of liberal construction embodied in the Act in order to effectuate its remedial purposes, as enunciated in Northeast Marine Terminal v. Caputo, 432 U.S. 249, 268 (1977). He underscored the fact that the Fourth Circuit had employed a functional approach in Humphries and Graham, citing Humphries for the proposition that a "situs 'need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime operation' for it to be within the LHWCA's scope." Parker, 75 F.3d at 938 (citing Humphries, 834 F.2d at 373).

Judge Murnaghan also noted in his opinion in Parker that "adjoining" means "touching or bounding" or being "near in space". In light of these definitions, he stated:

> Recognizing our duty to interpret the statute broadly so that Congress's remedial objectives may be achieved, . . . we should hold that the phrase "other adjoining area"

> does not require that an area be contiguous with navigable waters for that area to be covered by the LHWCA. To hold otherwise not only violates our duty to accord the statute a broad interpretation, but also fundamentally conflicts with the approach we took in Humphries.

Id. (citation omitted). Thus, Judge Murnaghan opined that an unduly restrictive interpretation of the situs requirement would ultimately subject claimants to the very "harsh" and "incongruous" results which prompted Congress to amend the situs requirement in the first place. Id. at 940 (citing Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 268 (1977)).

In the immediate case, the Fourth Circuit has taken its stringent situs test a step beyond Sidwell, thereby exposing the test as one which fails to take into consideration factors other than strict contiguity. The court did not address the character of the sites in question or the functional relationship between them and, instead, merely noted that the sites in question are separated from one another by a railroad spur and surrounding fencing. Accordingly, it is now clear that the Fourth Circuit has abandoned all functional considerations, thereby directly

contradicting its holdings in Graham and Humphries. Furthermore, given that the Graham case involved a situs which was separated from the navigable waterways by two public streets, it is apparent that, had the "integral part" test been applied by the Fourth Circuit in the matter at bar, the Petitioner would have prevailed below.

As illustrated above, the Fourth Circuit's test runs afoul of Congress's intent to create uniformity in the application of the jurisdictional requirements of the Act. This has resulted in a split within the circuit, and demonstrates the need for a binding interpretation of the language of Section 903 (a) by this Court.[5]

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[5] Since its decision in Kerby, the Fourth Circuit has decided another case involving the situs issue. In Jonathan Corp. v. Brickhouse, 1998 U.S. App. LEXIS 7786 (Nos. 96-2457, 97-1039, 4th Cir. April 23, 1998), the claimant was injured while working at his employer's waterfront facility. The Court held that the plant's contiguity with the Elizabeth River was not determinative because the plant in question was not connected to the Elizabeth River "in any way necessary to make workers to the plant longshoremen working at the water's edge." Id. The plant, according to the Court "was not a facility, the 'raison d'etre of which is its use in connection' with the nearby navigable waters.'" Id. (quoting Sidwell, 71 F.3d at 1139).

III. This case involves an important question of federal law concerning the application of the jurisdictional provisions of the Longshore and Harbor Workers' Compensation Act, that has not been, but should be, settled by this Court.

While this Court has made it clear in previous decisions that the 1972 amendments to the Act created the dual "situs" and "status" tests now applied in the circuits, it has yet to address the specific issue presented in the matter at bar. In Director, OWCP v. Perini North River Assocs., 459 U.S. 297, 324 n. 32 (1983), this Court held that the requirements of "status" and "situs" are distinct. In Herb's Welding, Inc. v. Gray, 470 U.S. 414, 426 (1985), this Court held that neither requirement should be read to render the other superfluous.

Most recently, in Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977), this Court determined that the Act should be liberally construed in conformance with its remedial purposes to avoid harsh and incongruous results. Id. at 268. Caputo involved questions of situs and status. The situs issue was decided on the basis that the injuries in question occurred on facilities which were

immediately adjacent to, and physically touched, a navigable waterway. Thus, this Court has yet to address the issue of what properly constitutes a line of demarcation between sites that are covered under the Act and those that are not. As such, it remains unsettled what constitutes an "adjoining area" as that phrase is intended in Section 903 (a) of the Act, and the circuits have created disparate tests in an effort to resolve the issue.

The immediate case presents this Court with an opportunity to resolve the important federal question of what constitutes a covered situs under the Act, and to thereby settle the conflicts which currently exist in the interpretation of the Act's jurisdictional reach. The legislative history of the Act evinces a clear intent to provide for uniformity in application of the Act. It is therefore critical that this Court settle the issue to prevent continued digressions from the intended purpose of the Act.

IV. The decision of the Court of Appeals for the Fourth Circuit is likely to have broad detrimental effects which will undermine the very purposes of the Act.

The Port of Greater Hampton Roads is the epicenter of maritime activity on the eastern seaboard of the United States. Within the Hampton Roads area is Newport News Shipbuilding and Dry Dock Company, one of the nation's largest shipbuilding and ship repair facilities for both private and United States Navy vessels. This facility covers approximately 550 acres and contains the largest dry dock in the Western Hemisphere. Port of Greater Hampton Roads Annual 1998, pp.114-16 (1998). It employs over 18,000 workers involved in the various facets of the shipbuilding and ship repair processes. Id. at 122. The shipyard has expanded over the course of the past several decades to the point that portions of the yard are separated by public streets not controlled or owned by the shipyard. Likewise, shipbuilding and ship-repair tasks often take place in areas not in direct contact with the property boundaries of the shipyard. Additionally, the shipyard has more than twenty miles of privately-owned railroad track,

as a private railroad runs through a portion of the facility. Id. at 20.

In addition to Newport News Shipbuilding, many other shipbuilding, ship repair, longshoring, and commercial enterprises are located within the Hampton Roads area. The area serves as the location for eleven large shipbuilding and ship repair facilities (not including Norfolk Naval Shipyard) (Id. at 108-121); six international marine container terminals (Id. at 34-43); seven merchandise terminals (Id. at 44-51); three coal terminals (Id. at 51-55); one grain handling facility (Id. at 54-55); and fifteen oil storage and handling facilities. Id. at 56-62. Many of these facilities have private railroad tracks running through them, like the one which runs through the Norfolk Naval Shipyard. Id. at 18-24; 71-74.

Moreover, statistics show that, in 1992, 1993, 1995 and 1996, more foreign water-bound commerce was exported through Hampton Roads than any other port on the East Coast. Id. at 4.. Likewise, Hampton Roads ranked fourth in this category overall in the entire United States. Id. Further, in 1993, Hampton Roads handled over 61 million short tons of cargo. Id. at 8. It received over 2,600 vessel calls from vessels representing many of the world's

leading shipping lines. Id. at 15. Finally, Hampton Roads is the largest coal port in the world. Id. at 128.

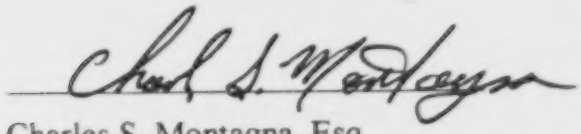
The foregoing facts demonstrate that decisions made by the Court of Appeals for the Fourth Circuit in the area of longshore compensation have far-reaching consequences, directly impacting many thousands of workers employed by myriad maritime companies in Virginia and other states within the Fourth Circuit. Given the substantial amount of maritime activity which takes place within its jurisdiction, the Fourth Circuit's restrictive application of the situs test is of particular moment. Because its test stands as an anomaly among the circuits that have considered the jurisdictional situs requirement of the Act, and because it conflicts with previous precedent within the Fourth Circuit, it is critical that this Court settle the issue to prevent discriminatory application of the Act in the future.

CONCLUSION

This case presents critical issues concerning the jurisdictional scope of the LHWCA which require resolution by this Court. The Court of Appeals for the Fourth Circuit has created a harsh and incongruous jurisdictional rule in contravention of significant precedent of three other federal circuits, and of precedent within the

Fourth Circuit itself. The Fourth Circuit's rule perpetuates disparate treatment of similarly-situated maritime workers, which is the very result Congress intended to prevent when amending the Act in 1972. The protections afforded by the 1972 amendment, therefore, have been rendered illusory. For these reasons, the Petitioner respectfully requests that this Court take the opportunity presented in this case to resolve the existing conflict among circuits, and thereby create the uniformity that Congress intended in its 1972 amendments to the Act.

Respectfully submitted,



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APPENDIX

Appendix A - Unpublished Opinion of the United States Court of Appeals entered February 24, 1998 I

Appendix B - Decision and Order of the Benefits Review Board, U.S. Dept. of Labor, dated February 26, 1997 VI

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APPENDIX A

Decision of the United States Court of Appeals for the Fourth Circuit: Kerby v. Southeastern Public Service Authority of Virginia, Nos. 97-1323, 97-1373, 1998 U.S. App. LEXIS 2965 (4th Cir. Feb. 24, 1998).

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SANDRA K. KERBY,

Petitioner,

v.

SOUTHEASTERN PUBLIC SERVICE AUTHORITY OF VIRGINIA; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents. No. 97-1323

SOUTHEASTERN PUBLIC
SERVICE AUTHORITY
OF VIRGINIA,

Petitioner,

v.

SANDRA K. KERBY;
DIRECTOR, OFFICE OF
WORKERS' COMPENSATION
PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,

Respondents. No. 97-1373

On Petition for Review of an Order of the
Benefits Review Board
(96-716, 96-705)

Argued: December 3, 1997
Decided: February 24, 1998

Before MURNAGHAN, ERVIN, and LUTTIG,
Circuit Judges.
Affirmed by unpublished per curiam opinion

COUNSEL

ARGUED: Gregory Edward Camden, RUTTER & MONTAGNA, L.L.P., Norfolk, Virginia, for Petitioners. Mark Douglas Stiles, WILLCOX & SAVAGE, P.C., Norfolk, Virginia, for Respondents. ON BRIEF: Matthew H. Kraft, RUTTER & MONTAGNA, L.L.P., Norfolk, Virginia, for Petitioners, Palmer S. Rutherford, Jr., WILLCOX & SAVAGE, P.C., Norfolk, Virginia, for Respondents.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

OPINION

PER CURIAM:

Petitioner Sandra K. Kerby was injured while working at a power plant that provides electricity and steam to the Norfolk Naval Shipyard ("NNS"). While the physical power plant building, as well as the real estate on which it is located, is owned by the United States Navy, the Navy has contracted with Respondent-cross petitioner Southeastern Public Service Authority ("SPSA"), a public

service authority created under the laws of the Commonwealth of Virginia, to maintain and operate the power plant. Kerby was an employee of SPSA, and had no direct employment relationship with the Navy.

While the parcel of property on which the power plant is located lies adjacent to NNS, and while NNS is located on land contiguous with the Southern Branch of the Elizabeth River, the parcel of land on which the power plant is located is not independently contiguous with that river or any other navigable waters. Moreover, the property on which the power plant is located is separated from NNS by a privately owned railroad spur, and by two chain-link fences, which surround the power plant and NNS respectively, and which separate the properties from the railroad spur, and from each other. SPSA employees do not have access to NNS by virtue of their employment at the power plant.

Subsequent to her injury, Kerby filed for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. Although an Administrative Law Judge held that Kerby was entitled to benefits, the Benefits Review Board reversed, finding that under Sidwell

v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. 1995), Kerby had failed to establish that her injury had occurred on a covered situs, as required by the LHWCA. See J.A. at 7-9 (discussing Sidwell). Because the BRB correctly determined that this case is controlled by Sidwell, and because the BRB correctly applied that precedent, we affirm essentially on the basis of its reasoning.*

AFFIRMED

*Because our holding that Kerby has failed, under Sidwell, to establish that her injury occurred on a covered situs suffices to resolve this case, we do not address the question, raised on cross appeal, of whether the BRB erred in finding that Kerby satisfied the LHWCA's status requirement.

APPENDIX B

Decision of the Benefits Review Board, United States Department of Labor, dated February 26, 1997: Sandra K. Kerby v. Southeastern Public Service Authority and William C. Rodriquez v. Southeastern Public Service Authority, 31 BRBS 6 (1997) (BRB No. 96-0705).

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U. S. DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

BRB NOS. 96-0705, 96-0716

SANDRA K. KERBY,

Claimant-Respondent

v.

DATE ISSUED:

FEB. 26, 1997

SOUTHEASTERN PUBLIC

SERVICE AUTHORITY

and

HARTFORD ACCIDENT AND

INDEMNITY COMPANY,

Employer/Carrier-Petitioners

WILLIAM C. RODRIQUEZ,
Claimant-Respondent

v.

SOUTHEASTERN PUBLIC
SERVICE AUTHORITY

and

HARTFORD ACCIDENT AND
INDEMNITY COMPANY
Employer/Carrier-Petitioners

DECISION AND ORDER

Appeals of the Decision and Order – Awarding Benefits, the Decision and Order – Granting Benefits, and the Order of Daniel A. Sarno, Administrative Law Judge, United States Department of Labor

Gregory E. Camden (Rutter & Montagna), Norfolk, Virginia, for claimants.

Palmer S. Rutherford, Jr. (Willcox & Savage), Norfolk, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (94-LHC-2989, 2990), the Decision and Order - Granting Benefits (95-LHC-508), and the Order (96-LHC-248) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).[1] We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by

[1] In an Order dated December 10, 1996, the Board consolidated for purposes of decision employer's appeals of the administrative law judge's Decision and Order - Awarding Benefits in claimant Rodriquez's case, BRB No. 96-0716, and the administrative law judge's Decision and Order - Granting Benefits, and Order, in claimant Kerby's case, BRB No. 960705. 20 C.F.R. §802.104.

substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.* 380 U.S. 359 (1965); 33 U.S.C. §991(b)(3).

The facts involved in these consolidated cases are not in dispute. In 1989, employer, a public service authority created under the laws of the Commonwealth of Virginia, entered into a contract with the United States Navy to operate and maintain a power plant that had been built adjacent to the Norfolk Naval Shipyard (NNS). NNS is located on land contiguous with the Southern Branch of the Elizabeth River. The United States Navy owns the real estate on which both its shipyard and the power plant are located, as well as the physical power plant building. The parcel of land on which the power plant is located is separated from NNS by a privately owned railroad spur. The power plant and NNS are each surrounded by a chain link fence which separates each property from the railroad spur and each other. Employer's employees do not have access to NNS by virtue of being such an employee; rather, access must be obtained by permission from NNS.

The power plant is designed to generate steam and electricity by burning refuse which is obtained from a local

trash collection facility which is owned and operated by employer. The steam generated by the power plant goes directly to NNS where it is used for heating and hot water for shore facilities and ships. All of the electricity generated by the power plant goes to a switch yard operated by NNS.[2] The electricity is then sent from the switch yard to NNS in order to satisfy NNS's electric requirements. Once these power requirements are met, excess electricity is sent back to the switch yard and sold to Virginia Power.

Claimants Rodriquez and Kerby each suffered injuries during the course of their employment with employer. Claimant Rodriquez was employed by employer as a boiler plant mechanic, whose responsibilities included the maintenance and repair of power plant equipment and machinery. On May 10, 1993, he suffered injuries to his hands and right elbow during the course of his employment with employer after performing sandblasting cleaning functions on a boiler. Subsequently, claimant Rodriquez

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[2] According to the testimony of Mr. Ronald Brown, employer's plant manager, the switch yard is actually on the power plant site, but is under the complete operational jurisdiction of NNS. *See* Rodriquez Transcript at 56-57.

underwent carpal tunnel releases on each hand, and a decompression of the radial nerve for his elbow condition. Claimant Rodriquez remained out of work for various periods in 1993 for his carpal tunnel releases, and in 1994 due to his elbow surgery.

In his Decision and Order, the administrative law judge concluded that claimant Rodriquez satisfied the situs requirement of Section 3(a) of the Act, 33 U.S.C. §903(a)(1988). The administrative law judge next found that since claimant Rodriquez maintained and repaired equipment which produced steam and electricity for NNS, the status element set forth in Section 2(3) of the Act, 33 U.S.C. §502(3)(1988), had also been established. Accordingly, the administrative law judge found that claimant Rodriquez established coverage under the Act and awarded temporary total disability benefits for both his hand and elbow injuries. 33 U.S.C. §908(b).

Claimant Kerby, who worked as a heavy equipment and overhead crane operator for employer at the power plant, suffered a work-related injury on August 1, 1994 when she stepped into a drainage ditch and fell backwards onto her left

shoulder and back. Claimant Kerby completed her shift but subsequently experienced pain in her neck back, hands and legs. She was diagnosed as suffering from cervical and lumbar strains, as well as carpal tunnel syndrome, and underwent a carpal tunnel release on September 30, 1994. Based on an MRI performed subsequent to the hearing, Dr. Snider opined that claimant Kerby had a pre-existing spinal cord compression on the nerve root which was aggravated by her fall on August 1, 1994, and that this cervical disc aggravation caused claimant's wrist symptomatology. According to Dr. Snider, claimant Kerby has been incapacitated from work since December 1, 1994.

At some point following her injury, claimant Kerby returned to work for employer in a light duty office position. However, she was terminated from this position on or about March 30, 1995, due to a dispute with her supervisor. Employer voluntarily paid to claimant Kerby temporary partial disability benefits from August 2, 1994 to August 27, 1994, temporary total disability benefits from September 28, 1994 to October 31, 1994, and temporary partial disability benefits from November 1, 1994 to April 15, 1995 and continuing. 33 U.S.C. §908(b), (e).

At the hearing, the administrative law judge accepted the parties' stipulation that the coverage finding made in claimant Rodriquez's case would apply to claimant Kerby's case as well. Accordingly, in his Decision and Order, the administrative law judge found that claimant Kerby established coverage under the Act. *See* Kerby Decision and Order at 3 n.2. The administrative law judge next found that claimant Kerby's wrist injury was aggravated by her work-related-accident on August 1, 1994, and thus found that causation was established. After finding that claimant Kerby established a *prima facie* case of total disability, the administrative law judge determined that as employer failed to submit any evidence regarding suitable alternate employment, employer failed to establish the availability of suitable alternate employment. Consequently, the administrative law judge awarded claimant Kerby temporary total disability compensation from April 16, 1995 and continuing. 33 U.S.C. §908(b). Additionally, the administrative law judge ordered employer to provide such medical treatment as the nature of claimant Kerby's work-related disability shall require, pursuant to Section 7 of the Act, 33 U.S.C. §907.

Subsequent to the Decision and Order, claimant Kerby notified the administrative law judge that employer had refused to provide medical treatment. In a supplemental Order, dated August 7, 1996, the administrative law judge rejected employer's argument that, since the case was on appeal to the Board, it was not obligated to provide medical treatment and ordered employer to comply with his initial Decision and Order.

On appeal, employer contends that the administrative law judge erred in finding that claimants Rodriquez and Kerby established coverage under the Act. Specifically, employer, citing *Sidwell v. Express Container Services, Inc.* 71 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. *1995), cert. denied,* ____ U.S. ____, 116 S. Ct. 2570 (1996), asserts that the even though the property on which the ship power plant is located is "formally a part of the Naval Base," it is not an "adjoining area" as the power plant is separated from NNS by chain link fences and railroad tracks and is thus not contiguous with navigable waters. Employer's Brief at 6-7. Therefore, employer argues, claimants were not injured on a covered situs under Section 3(a). Next, employer argues that the status test was not met in either case since the work of claimants Rodriquez and Kerby, indeed the work of the entire

power plant, lacks a significant relationship to traditional maritime activity. Regarding claimant Kerby's claim, employer additionally appeals the administrative law judge's findings regarding the nature and **eat of her disability, as well as its liability for medical expenses.[3] Claimants respond to employer's appeals, urging affirmance of the administrative law judge's decisions.

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[3] Employer filed a supplemental appeal in claimant Kerby's case, appealing the administrative law judge's August 7, 1996 supplemental Order. The Board accepted this appeal on September 19, 1996, and consolidated it with employer's original appeal in *Kerby*. BRB No. 96-0705/S. Claimant Kerby thereafter filed a motion to dismiss this supplemental appeal, to which employer responded. In its Order dated December 10, 1996, the Board denied the motion to dismiss, and directed employer to show cause within 10 days of receipt of the Order why its supplemental appeal should not be dismissed for failure to file a Petition for Review and brief. In a letter dated December 16, 1996, employer responded to the Board's show cause order, stating that its supplemental appeal was merely a protective filing or a reaffirmation of its initial position, and that it had nothing to add to its position as stated in its original Petition for Review and brief in *Kerby*, dated April 17, 1996.

I. Status

Employer initially challenges the administrative judge's determination that claimants Rodriquez and Kerby satisfied the Act's "status" requirement. In order to be covered under the Act, a claimant must satisfy both the "situs" requirement of Section 3(a) and the "status" requirement under Section 2(3) of the Act. *See P.C. Pfeiffer Co., Inc v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co., Inc v. Caputo*, 432 U.S. 249, 6 BRBS at 165. Under *Caputo*, a claimant need not be engaged in maritime employment at the time of the injury to be covered under the Act, as the Act focuses on occupation rather than on duties at the time of the injury. *See, e.g., Dupree v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

In determining that claimant Rodriquez, and by extension claimant Kerby, satisfied the status requirement, the administrative law judge found that claimant Rodriquez's work in maintaining and repairing equipment which produced steam and electricity for NNS qualified as maritime employment within the meaning of Section 9(3) of the Act. In challenging the administrative law judge's conclusion that claimant Rodriquez satisfied the "status"

requirement, employer contends that not all of the electricity and steam generated by the power plant is used by NNS for maritime purposes. Rather, employer notes that some of the generated electricity is directed out of NNS and sold to Virginia Power for general commercial, non-maritime use. Moreover, employer asserts that much of the steam provided by the power plant to NNS is used for "hotel service" for ships; that is to say, heat and hot water for showering, washing and other personal needs of the ships' crew members. It is therefore employer's contention that these uses of electricity and steam lack a significant relationship to traditional maritime activity involving navigation and commerce on navigable waters.

In the instant case, it is undisputed that the employment duties of claimants Rodriquez and Kerby involved the maintenance and operation of the power plant, which provided electricity and steam for shipbuilding and ship repair operations at NNS.[4] Ronald Brown, employer's

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[4] Employer argues that it is a public service authority, and not an employer whose employees are engaged in maritime employment. However, the status test under Section 2(3) is a functional test, and the nature of claimants world controls here just as it does in the case of any other employee employed by a private contractor to work on ships at the

plant manager, testified that all of the electricity generated by the power plant goes to a switch yard under the control of the United States Navy. The system is designed so that all of NNS's electrical requirements must first be met; thereafter, the Navy has the discretion to transfer any surplus electricity to Virginia Power. *See* Rodriquez Transcript at 56-59. In view of the fact that NNS controls the output of the power plant and any sales of power for commercial use, the fact that some power may go out of NNS is not dispositive, as it is clear that the power is directed from the plant exclusively to NNS.

Moreover, it is indisputable that electricity and steam are mandatory components in the shipbuilding and ship repair process. *Compare Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh'g denied*, 910 F.2d 1179 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991)(status test met where employee's connecting and disconnecting fuel hoses aided in loading process). On these facts, the administrative

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Naval Shipyard. If claimant meets the status test under Section 2(3), the employer is an employer under Section 2(4), 33 U.S.C. §902(4), as it necessarily employs workers engaged in maritime employment.

law judge properly relied on the decision of the United States Supreme Court in *Schwalb*, 439 U.S. at 40, 23 BRBS at 96 (CRT), where the Court held two janitorial employees covered on the basis that employees injured while maintaining equipment necessary to the loading and unloading process are maritime employees under Section 2(3). In similar cases, the Board has held that the maintenance of shipyard facilities is essential to the building and repairing of ships, and thus, such work is covered under Section 2(3) of the Act. *See, e.g., Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991). Work involving the repair and maintenance of an employer's marine facility is also covered under the Act. *See Eckhoff v. Dog River Marina & Boat Works, Inc.* 28 BRBS 51 (1994); *Dupre*, 23 BRBS at 86; *see also Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 19Sl)(maintenance of structure housing shipbuilding machinery is essential, as is repair of machines themselves); *Price v. Norfolk & W. Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980)(maintenance worker injured painting a structure essential to loading operations); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir. 1977)(sandblasting crane to remove rust is covered employment due to necessity for use of crane in shipbuilding). Based on this precedent, we hold that

maintenance of the shipyard power plant is similarly covered as it is necessary to the operation of the shipyard.

Employer's reliance on *Weyher/Livsey Constructors Inc. v. Prevetire*, 27 F.3d 985, *28* BRBS 57 (CRT)(4th Cir. 1994)(Sprouse, J., dissenting), *cert. denied*, U.S. , 115 S.Ct. 1691 (1995), which concerned the same power plant as the one in question, is misplaced. In *Prevetire*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that a construction worker injured while engaged in construction of the power plant did not meet the status requirement under Section 2(3). The court reasoned that a worker's employment in only the construction of the power plant was not sufficient to confer coverage under Section 2(3) simply because the power plant being built would eventually provide steam and electricity to shipbuilding and ship repair operations. The court found claimant was thus not covered, as his construction work could not be converted into maritime employment merely by its location. In making this holding, however, the court noted the distinction between work involving the construction of the power plant, and work involving the power plant's "later operation or maintenance." *Id*, 27 F.3d at 989-990, 28 BRBS at 61-62 (CRT). As claimants herein performed tasks related

to operation and maintenance of a facility essential to shipbuilding and ship repair, their duties are unlike those of claimant in *Prevetire,* and that case does not lead to the conclusion that claimants herein are not covered by the Act. Accordingly, we affirm the administrative law judge's determination that the employment duties of claimants Rodriquez and Kerby in maintaining and operating equipment at the power plant were sufficient to confer coverage under Section 2(3) of the Act, as that finding is supported by substantial evidence and is in accordance with law. *See Schwalb,* 493 U.S. at 47, 23 BRBS at 99 (CRT).

II. Situs

Employer next contends that the administrative law judge erred in finding that claimants Rodriquez and Kerby were injured on a covered situs. Section 3(a) provides that:

> Compensation shall be payable under this Act . . . only if the disability or death results from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or *other adjoining area* customarily used by an employer in loading,

unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § §903(a)(1988)(emphasis added). In *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. 1995), *cert. denied, U.S.* , 116 S.Ct. 2570 (1996), the United States Court of Appeals for the Fourth Circuit held that an area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters. To be included as an "other area" under the Act, the area must be a discrete shoreside structure or facility which must be "customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. §903(a)(1988); *Sidwell,* 71 F.3d at 1139, 29 BRBS at 143 (CRT); *see also Parker v. Director, OWCP,* 75 F.3d 929, 30 BRBS 10 (CRT)(4th Cir.), *cert. denied,* ___ U.S. ____, 117 S. Ct. 58 (1996).

In finding that the power plant at issue herein "appears to be strategically located in an adjoining area," *see* Rodriquez Decision and Order at 7-8, the administrative law judge relied on several factors, including the facts that the power plant was built by the United States Navy and, like the shipyard, is owned by the Navy and located on property

owned by the Navy. The administrative law judge further found that the location of the power plant was not fortuitous, but rather it was located on Naval property adjacent to NNS to efficiently provide steam and electricity to the shipyard. The administrative law judge found the facts that NNS and the power plant are separated by a privately owned railroad spur, and that each property is fenced off from the other and the railroad spur, to be incidental.

We reverse the administrative law judge's finding that the power plant is a "covered situs" as the facility is not an "adjoining area" as defined by the Fourth Circuit in *Sidwell.* In *Sidwell,* the court cautioned that reliance on conventional property lines must not be eschewed, stating "that it is inescapable that some notion of property lines will be at least relevant, if not dispositive, in determining whether the injury occurred within a single 'other adjoining area.'" *Sidwell,* 71 F.3d at 1140, 29 BRBS at 144 (CRT). We agree with employer that even though the United States Navy owns the shipyard, the property on which the power plant and shipyard are located and the power plant itself, such ownership does not mandate a finding that the "situs" requirement of Section 3(a) has been satisfied in view of the clear separation of the two parcels of land.

In this regard, we do not consider it incidental that a private railroad spur separates NNS from the power plant, and that a chain link fence surrounds the perimeters of both NNS and the power plant, further separating the properties from each other. Rather, the location of this railroad spur and the presence of two mutually exclusive fenced areas indicates that the two properties are separate and distinct from one another. Rather than being part of the some property, the shipyard and power plant are on two distinct parcels of land. Moreover, the uncontroverted testimony of William Wrenn, a maintenance supervisor at the power plant, indicates that employer's personnel do not have immediate access to NNS by virtue of their employment status with employer. To enter the shipyard, employer's employees need to obtain a special pass from NNS; an employee who does not have such a pass must have an NNS staff member escort him into the shipyard. *See* Rodriquez Transcript at 29-31. Unlike NNS, the power plant and its employees are physically isolated from navigable waters and have no nexus with the Southern Branch of the Elizabeth River.

Thus, as the power plant at issue herein is separated from NNS by not only the fences that surround each property

but by the privately owned railroad tracks which run between the two properties, as well as the personnel practices of NNS, the power plant must be considered to be located on land separate and distinct from NNS. As a separate and distinct piece of property, the power plant must be contiguous with navigable waters, in order to be considered an adjoining area under the Fourth Circuit's holding in *Sidwell.*[5] As it is uncontroverted that the power plant does not adjoin navigable waters, we reverse the administrative law judge's determination that claimants Rodriquez and Kerby were injured on a covered situs under Section 3(a), and the awards of benefits to claimants Rodriquez and Kerby are hereby vacated.[6]

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[5] Claimant's reliance on *Weyer/Livsey Constructors, Inc. v. Prevetire, 27* F.3d 985, 26 BRBS *57* (CRT) (4th Cir. 1994), is misplaced, as the issue of situs was specifically not before the court in that case. Although statements by the court in that case indicate the court believed the power plant was on the NNS site, the facts were not developed in that case nor was situs argued. Moreover, the Fourth Circuit's decision in *Sidwell* was issued subsequent to that in *Prevetire,* and thus constitutes controlling case law within this circuit regarding the issue of situs.

[6] Based on the foregoing holding, the remaining issues raised by employer in its appeal of the administrative law judge's decisions in *Kerby* are moot.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits, 94-LHC-2989, 2990, Decision and Order – Granting Benefits, 95-LHC-508, and Order, 96-LHC-248, are reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

APPENDIX C

Decision of Administrative Law Judge Daniel A. Sarno, Jr., dated February 9, 1996: Kerby v. Southeastern Public Service Authority (ALJ No. 95-LHC-508).

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Date: February 9, 1996

Case No.: 95-LHC-508

OWCP No.: 5-93636

In the Matter of

SANDRA R. KERBY,
Claimant,

v.

SOUTHEASTERN PUBLIC SERVICE AUTHORITY,
Employer,

and

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Carrier.

APPEARANCES: Gregory E. Camden, Esq.
For the Claimant

Palmer S. Rutherford, Esq.
For the Employer

BEFORE: Daniel A. Sarno, Jr.
Administrative Law Judge.

DECISION AND ORDER - GRANTING BENEFITS

This proceeding arises from a claim for benefits under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, et seq.

A formal hearing was held in Newport News, Virginia on August 8, 1995, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. Both

parties participated in the hearing and filed post-hearing briefs.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS[1]

The Employer and the Claimant stipulate to the following, and I find:

1. There was an injury arising out of and in the course of performance on August 1, 1994;
2. That the Claimant gave notice of the injury in a timely fashion;
3. That there was a timely First Report of Accident filed by the Employer;
4. That there was timely Notice of Controversion filed by the Employer;

[1] The Stipulations were orally set forth at the hearing [Tr. 4, 5].

5. That the Claimant has been paid temporary partial disability at the rate of $66.15 from August 2, 1994 to September 27, 1994;

6. That the Claimant has been paid temporary total disability from September 28, 1994 to October 31, 1994;

7. That the Claimant has been paid temporary partial disability in the amount of $126.15 from November 1, 1994 to April 15, 1995;

8. That the Claimants average weekly wage was formulated at $482.12.

Issues

I. Whether an employee involved in the maintenance of a steam and electrical power plant, whose primary purpose was to provide power for ship repair work at Norfolk Naval Shipyard is a Maritime employee" under tine Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (l994)?[2]

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[2]The parties stipulated to be bound on the jurisdiction issue by the Presiding Judge's decision in a related case, William C. Rodriquez v. Southeastern Public Service Authority, 94-LHC-2989, 2990. [Tr. 5, 6].

II. Whether the Administrative Law Judge must give full faith and credit to the June 23, 1995 Decision and Order of the Virginia Workers' Compensation Commission?

III. Whether the Claimant's treatment for carpal tunnel syndrome is related to her original injury of August 1, 1994 suffered while working for Southeastern Public Service Authority?[3]

IV. Whether the Claimant is entitled to temporary partial disability benefits from April 16, 1995, the date she was terminated from suitable alternative employment to the present and continuing?[4]

On February 8, 1996, the Presiding Judge issued a decision and order in that case. The Presiding Judge concluded that Claimant had established jurisdiction under the Act. Accordingly, the parties in the present case are bound by that determination.

[3] Claimant submitted post-hearing medical evidence. Claimant now avers that the issue is whether Claimant's cervical and arm problems are related to her August 1, 1994 injury.

[4] Based on the post-hearing medical evidence, Claimant now seeks temporary total disability from April 16, 1995 to the present and continuing.

After the hearing took place, Claimant submitted additional medical documents under cover letter dated Outgoes 24, 1995. Those documents are marked for identification and received into evidence as follows:

DX 9 - Letter and office notes dated October 12, -A 1995 by Dr. Snider.

Employer submitted with its supplemental brief the deposition testimony of Dr. Snider.[5] That document is marked for identification and received into evidence as follows:

EX 21 - Dr. Snider's deposition taken December 1, 1995.

Under cover letter dated January 2, 1996, Claimant additional medical record (sic). These documents are

[5] Claimant's supplemental brief noted that Claimant had also sent a copy of Dr. Snider's deposition to be marked as a Claimant's Exhibit. My records do not reflect receiving this proposed Claimant's Exhibit; however, since Employer offered the same document into evidence, Claimant need not re-submit that evidence which would merely be cumulative at this point.

marked for identification and received into evidence as follows:

CX 10 - Medical report by Dr. Swingle dated October 19, 1995

CX 11 - Medical report by Dr. Swingle dated November 6, 1995.

FINDINGS OF FACT

1. Claimant, Sandra K. Kerby, is a 44 year old female who was employed by Southeastern Public Service Authority (SPSA). She worked as a heavy equipment and overhead crane operator. [Tr. 15].

2. On August 2, 1994, she and fellow workers were working with a new piece of equipment, a vector truck, which was used to clean ash from a concrete drainage ditch at the SPSA facility. [Tr. 13]. The operation required one worker to operate a water hose to loosen the ash while a second worker operated a suction hose to accumulate the loosened ash. [Tr. 13].

3. At the time of the injury, Claimant was operating one hose and a co-worker was operating the other.

Claimant was moving backwards. Grates had been removed from the drainage ditch behind Claimant. Claimant stepped back and her legs dropped into the drainage ditch. [Tr. 16]. The ditch was about 12" deep. [Tr. 29]. Claimant continued to fall backward and to her left. Claimant testified that she struck her buttocks on the stacked grates and then struck her left side and shoulder and back on the cement floor. [Tr. 17, 25; CX 5-1; EX 5, pp. 3,4]. Claimant denied she fell on her hands during the accident. [Tr. 25].[6] Claimant was helped to her feet and thought that she was okay. Claimant changed her uniform and completed a 16-hour double work shift. However, she began to suffer from a headache as well as pain in her neck, back, arms and legs. [Tr. 18, 19, 24].[7]

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[6] Claimant consistently reported and testified that since she fell backwards, she did not fall on her hands and knees. [Tr. 25, CX 5-1; EX 5-3]. She did not recall ever striking her hands. [Tr. 25]. She described the fall as being quite sudden and shocking. [Tr. 23].

[7] She described the symptoms in her hands and arms as numbness and "hot needles and zinging and my hands feel like they swell up real big. I lose feeling." [EX 5-3; Tr. 25].

4. Two co-workers, David Robinson and General Turner, were present when the accident happened. David Robinson was working the other hose. He described Claimant's accident as stepping into the ditch and landing in a sitting position. He denied she fell on her back. Moreover, he believed Mr. Turner may have caught her. [Tr. 30-33]. However, he was not certain about that. [Tr. 32]. General Turner testified that he observed Claimant "step into the uncovered part of the U ditch and basically sit down on the next grate behind her." [Tr. 35]. He did not see Claimant go all the way down on her back. He denied catching Claimant; he merely assisted her up. He could not recall what happened to the hose Claimant was holding. [Tr. 34-36]. When the accident happened, he was talking to another worker. [Tr. 34].

5. On August 3, 1994, Claimant was seen by Dr. Creef at Now Care because of continuing complaints of pain. [CX 5]. Dr. Creef diagnosed Claimant as suffering an acute cervical lumbar sacral strain and right ankle strain. [CX 5-1].

6. Claimant began treatment with Dr. Gold, an orthopedist on August 17, 1994. [CX 4-5]. Dr. Gold

initially diagnosed her problem as a cervical-strain and lumbar strain. [CX 4-6]. On September 28, 1994, Dr. Gold wrote "also still having the paresthesia in her hands. The EMG results show bilateral carpal tunnel syndrome." [CX 4-4, 7-1]. Because of the EMG results, Dr. Gold decided to perform a carpal tunnel syndrome release. [CX 4-4]. This surgery was performed on September 30, 1994. [CX 6-1]. Dr. Gold opined that Claimant's carpal tunnel syndrome condition was caused by Claimant's work-related injury of August 1, 1994. [CX 4-1]. Dr. Gold stated "Although I cannot document the mechanism of injury, I again feel that since there were no complaints of problems in the hands and wrists before the accident and then there was evidence of carpal tunnel syndrome documented by EMG and nerve conduction studies, that the accident caused the carpal tunnel syndrome problems." [CX 4-1]

7. Dr. Snider, the neurologist who had been consulted concerning the diagnosis of carpal tunnel syndrome, related that condition to the industrial accident because he was sunder the impression that when the patient was thrown hack, that she tried to break her fall with her hands." [CX 1-1]. The doctor went on to state that "However, if the patient did not have any direct trauma to the wrist and did

not try to pull on anything to break her fall, possibly causing a traction injury, I cannot clearly state that her capral (sic) tunnel syndrome is related to the injury. [CX 1-1].[8]

8. Following hearing, Claimant underwent an MRI scan of the neck. Dr. Snider reviewed the MRI scan and submitted another report with related office notes dated October 12, 1995. [CX 5]. Dr. Snider opined, based upon the MRI and Claimant's symptomatology, that "it is very likely the patient does have a myelopathy and a cervical polyradiculopathy caused by her work injury due to the acute compression of her spine...." [CX 9, p. 2]. In his letter to Claimants attorney, Dr. Snider stated:

> Mrs. Kerby's MRI scan did show significant disk disease which I believe is causing her symptomatology. I am referring her to a neurosurgeon for a second opinion in this regard. I think the nature of her cervical disk

[8] Dr. Snider also noted in his December 1, 1994 report that "She has achieved some improvement in the burning in her left hand with this [surgery] but she continues having problems in spite of the surgery. Her hands continue to be weak. She has been dropping things and notes her grip has been weak." [CX 1-8].

> disease caused some confusion, with her symptoms masquerading as carpal tunnel syndrome. As indicated in my note, I certainly feel that her shoulder and arm pain have been caused by the cervical disk disease with bilateral nerve root injury from her fall. [CX 9, p.1].

9. Dr. Snider's deposition testimony was taken on December 1, 1995. [EX 21]. His deposition testimony was consistent with his recent written report and office notes. Dr. Snider opined that Claimant had a pre-existing chronic spinal cord compression and possible chronic compression on the nerve root which was aggravated by a sudden pressure on the nerve. This was caused by Claimants August 1, 1984 work injury in which Claimant fell on her buttocks and back. [EX 21, pp. 20-21, 28, 29, 30-32].[9]

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[9] Dr. Snider opined that this cervical condition has existed since her injury and would have shown upon on an MRI on August 1, 1991. He stated that Claimant was incapacitated from work since he first saw her on December 1, 1994. [EX 21, pp. 24-27].

10. The records, dated October 19, 1995 and November 6, 1995, of Dr. Swingle, a neurosurgeon, corroborate Dr. Snider's diagnosis of a cervical myelopathy. [CX 10, 11]. It is clear from his reports that Dr. Swingle believes that Claimant's symptoms of "frequent electrical shock sensations across her neck and shoulders and into her hands..." are not associated with carpal tunnel syndrome. Dr. Swingle suggests surgery consisting of posterior multilevel cervical decompressive laminectomies for decompression of the spinal cord. Dr. Swindle describes the surgery as fairly risky.

CONCLUSION OF LAW

FULL FAITH AND CREDIT

Employer argues that pursuant to the full faith and credit clause of the Constitution of the United States, the Presiding Judge is bound by the June 23, 1995 opinion of the Virginia Workers' Compensation Commission which addressed the same workplace injury in a state workman's compensation proceeding.

Employer's argument is rejected. Employer has made no attempt to show that the legal standards and standards of proof are the same in two jurisdictions. See Newport News Shipbuilding and Dry Dock v. Director, OWCP, 583 F.2d 1213 (4th Cir. 1978), cert. denied, 44 U.S. 915; Barlow v. Western Asbestos Co., 20 BRBS 179 (1988).

CAUSATION

To qualify for disability benefits under the Act, Section 2(2) of the Act requires that the injury sustained by the claimant must arise out of and in the course of employment. In proving disability a claimant is aided by the Section 20(a) presumption which states that "in the absence of substantial evidence to the contrary, it is presumed (t)hat the claim comes within the provisions of the Act." 33 U. S. C. 5920(a). The presumption applies to the issue of whether an injury was casually related to employment. Stanton v. J. Frank Kelly Inc., 554 P.2d 1075, 1082, 4 BRBS 466, 475 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976) Welding v. Bath Iron Works Corp., 13 BRBS 812 (1981). In order for Section 20(a) to apply to causation, the claimant must establish a prima facie case by

proving, one, that she sustained physical harm, i.e., an injury; and two, that a work-related accident occurred, or working conditions existed which could have caused that harm. Keliata v.Triple Machine Shop, 13 B.R.B.S. 326 (1981); Adams v. General Dynamics Corp., 17 BRBS 258 (1985); Jones v. J. F. Shea Co., Inc., 14 BRBS 207 (1981).

An inquiry occurs if something unexpectedly goes wrong within the human frame. If an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant condition is compensable, the relative contributions of the work-related injury and the prior condition are not weighed to determine claimant's entitlement ("aggravation rule"). Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). Furthermore, an injury includes one occurring gradually as a result of continuing exposure to conditions of employment, and it is sufficient if the employment aggravates the symptoms of the process. Obert v. John T. Clark and Son of Maryland, 23 BRBS 157 , 159 (1990); Pittston v. Jeffboat, Inc., 18 BRBS 212 (1986).

The parties have stipulated that Claimant suffered a work-related injury in August 1, 1994. Claimant insisted that

on that date, while cleaning ash from a concrete drainage ditch at SPSA, she stepped back and dropped into the drainage ditch, striking her buttocks, left side, shoulder and back on the cement floor. Claimant began to suffer headaches as well as leg, neck and back pain. She also began to experience pain and numbness in her arms and hands. Eventually, Dr. Gold, Claimant's orthopedist, diagnosed carpal tunnel syndrome related to the work place injury. However, he could not document the specific mechanics of the injury. Dr. Snider, Claimant's neurologist, opined that direct trauma would have necessary in order to connect Claimant's carpal tunnel syndrome to the August 1, 1994 injury. However, Claimant consistently maintained from the beginning that she did not suffer trauma to her hands or arms when she fell. Yet, she began having symptoms of pain and numbness in her arms shortly after the accident. Right through the hearing, Claimant did not falter in her version of the events, even though Dr. Snider could only link the fall to Claimant's carpal tunnel syndrome if she fell on her hands or arms. The medical evidence submitted subsequent to the hearing supports Claimant's assertion that she suffered no trauma to her hands or arms. This uncontradicted medical evidence shows that Claimant's wrist problems were only masquerading as carpal tunnel syndrome. A recent MRI

convinced Dr. Snider that Claimant had a pre-existing chronic spinal cord compression on the nerve root which was aggravated by sudden pressure on the nerve when Claimant fell on her buttocks and back on August 1, 1994. This cervical disc aggravation caused Claimant's wrist symptomatology. Dr. Snider's opinion is corroborated by Dr. Swingle. Based on the foregoing, I find that Claimant has satisfied her prima facie case by proving that she sustained a physical harm and that a work-related accident occurred which aggravated a pre-existing back condition.

Once the-claimant establishes a prima facie case, the burden shifts to the employer to rebut the Section 20(a) presumption and to establish with substantial countervailing medical or factual evidence that Claimant's harm was not caused or aggravated by Claimant's employment. Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980); Rajoitte v. General Dynamics Corp., 18 BRBS 85 (1986); and Hensley v. WMATA, 65 P.2d 264, 13 BRBS 182 (CRT)(D.C. Cir. 1981), cert. denied, 456 U.S. 504 (1982), *rev'g* BRBS 468 (1979). Essentially, the employer must come forward with sufficient evidence to burst the bubble of the presumption. In this case, Employer offers the testimony of two co-workers to show that on August 1, 1994, Claimant did

not fall on her back. I find that the testimony of David Robinson on that point is entitled to no weight. It became clear at the hearing that Mr. Robinson may have either not seen the fall or not remembered it accurately. He believed that a co-worker, General Turner, may have broken Claimant's fall. However, Mr. Turner later stated that he did not catch Claimant or break her fall. Consequently, I will not place any reliance of Mr. Robinson's recollection concerning the events surrounding the fall.

Mr. Turner stated that, at the time of the accident, he was talking to another employee. He observed Claimant step back into the ditch and basically sit down on the grates behind her. He did not remember seeing Claimant fall to her back. He did help Claimant to her feet. Looking only at that testimony, it is possible to conclude that Claimant's harm was not caused or aggravated by her employment. Consequently, I find that Employer has rebutted the Section 20(a) presumption.

Once the Section 20(a) presumption is rebutted, it falls out of the case and the judge must then weigh all evidence and resolve the case based on the record as a whole. Swinton, 554 F.2d 1075, 4 BRBS 466; Hislop v. Marine

Terminals Corp., 14 BRBS 927 (1982). Notwithstanding Mr. Turner's testimony, I find that compelling weight must be given to the testimony of the Claimant as buttressed by the medical evidence. Crucial to this I believe is Claimant's total credibility. She steadfastly insisted from the time of the injury through the hearing that she did not fall on her hands. She unequivocally maintained this position even in the face of medical evidence which could not link her carpal tunnel syndrome to her work accident without at least some trauma to her hands. Only after the hearing did new medical evidence link her hand and arm symptoms to a cervical condition and not to carpal tunnel syndrome. Her steadfastness in refusing to compromise on a fact potentially damaging to her claim, lends, in my opinion, very high credibility to her testimony in general. Consequently, I believe Claimant when she testified that during the accident she landed on her buttocks, back, left side and left shoulder. The medical evidence confirms that such an accident could aggravate Claimant's pre-existing cervical condition and cause the symptoms in Claimant's hands and arms. Mr. Turner may have been near Claimant when the accident occurred; however, he was talking to someone else at the time. In light of the compelling contrary evidence, I am not

convinced that Mr. Turner's observations were completely accurate.

Thus, Claimant has proven that she suffered a pre-existing injury to her back which was aggravated by work injury on August 1, 1994.

Temporary Total Disability

Total disability is defined as complete incapacity because of injury to earn the wages that the employee was receiving at the time of injury in the same or any other employment. [33 U.S.C. § 902 (10)]. The employee must prove that she cannot return to her regular or usual employment due to her work-related injury. If the employee satisfies this burden, the burden shifts to the employer to establish the existence of realistically available job opportunities within the geographical area where the employee resides which the employee is capable of performing, considering her age; education, work experience, and physical restrictions. Trans-State Dredging v. Benefits Review Board, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984), rev'g Turner v. Trans-State Dredging, 13 BRBS 53 (1980); Newport News Shipbuilding & Dry Dock Co. v.

Director, OWCP [Chappell], 592 F.2d 762, 10 BRBS 81 (CRT)(4th Cir. 1979).

Dr. Snider has submitted an unrebutted medical opinion testimony that Claimant has been totally incapacitated from work since at least December 1, 1994. Claimant has established a prime facie case of total disability.

Once the employee establishes a prima facie case of total disability, the burden shifts to the employer to establish the existence of realistic available job opportunities with the geographic area in which the employee resides, that she is capable of performing considering her age, education, work experience, and physical restrictions, and that she could secure if she exerted diligent effort. Trans-State Dredging v. Benefits Review Board, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984), rev'g Tamer v Trans-State Dredging, 13 BRBS 53 (1980); Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell], 592 F.2d 762, 10 BRBS 81 (CRT) (4th Cir. 1979). The Board has held emphatically that the law does not require the employer to find a job for claimant. See Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473 (1978); see also Pernell v. Capitol Hill Masonry, 11 BRBS 532, 537 (1978. This burden of showing

suitable alternative work opportunities entails a presentation of actual and not theoretical job possibilities, see Pilkington, supra, including a showing that suitable jobs are available and proof of claimant's earning capacity by, at least, establishing the pay scale for such suitable jobs. Letendre v. Braswell Shipyards, Inc., 11 BRBS 56 (1979).

Employer has not submitted any evidence on the question of suitable alternative employment. Consequently, Employer has not met its burden of proving the existence of suitable alternative employment.

Based on the relevant evidence, I find that Claimant suffered a temporary total disability from April 16, 1995 to the present and continuing.

ORDER

1. The Employer shall pay to the Claimant, SANDRA K. KERBY, compensation for her temporary total disability at the compensation rate based on her average weekly wage of $482.12 from April 16, 1995 to the present and continuing.

2. The Employer shall receive credit for all compensation that has been paid.

3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued unpaid benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

4. Pursuant to Section 7 of the Act, the Employer shall provide such medical treatment as the nature of the Claimant's work-related disability shall require.

5. All computations are subject to verification by the District Director.

6. Claimant's attorney, within 30 days of the receipt of this Order, shall submit a fully-supported fee application, a copy of which shall be sent to opposing counsel, who then shall have 10 days to respond with objections thereto.

_____

DANIEL A. SARNO, JR.
Administrative Law Judge

APPENDIX D

Decision of Administrative Law Judge Daniel A. Sarno, Jr., dated February 8, 1996: Rodriquez v. Southeastern Public Service Authority, (ALJ Nos. 94-LHC-2989 and 94-LHC-2990).

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Date: February 8, 1996
Case Nos.: 94-LHC-2989 and 94-LHC-2990
OWCP Nos.: 5-91871 and 5-92345

In the Matter of

WILLIAM C. RODRIQUEZ,
Claimant,
v.

SOUTHEASTERN PUBLIC SERVICE AUTHORITY,
Employer,

and

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Carrier.

Appearances: Gregory E. Camden, Esq.
For the Claimant
Palmer S. Rutherford, Esq.
For the Employer

Before: Daniel A. Sarno, Jr.
Administrative Law Judge

DECISION ORDER – AWARDING BENEFITS

This proceeding arises from a claim for temporary total disability benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq. A hearing was held on June 22, 1995, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. The Claimant and

the Employer participated in the hearing, and submitted posthearing briefs

The findings and conclusions that follow are based on the complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties stipulated to the following, and I find:

1. That an employer/employee relationship existed at all relevant times;
2. That the Claimant sustained an injury arising out of and in the course of employment on May 10, 1993;
3. That the Claimant alleges an injury on June 13, 1993;
4. That timely notices of injury were given by the employee to the employer;
5. That timely claims for compensation were filed by the employee;
6. That the employer filed timely first reports of injury with the Department of Labor and timely notices of controversion;

7. That the Claimant was paid compensation for the following periods under the Virginia Workers' Compensation Act: temporary total disability from June 29, 1993 to August 22, 1993 and November 2, 1993 to November 28, 1993;
8. That the Claimant has an average weekly wage of $677.30, yielding a compensation rate under the Longshore and Harbor Workers' Compensation Act of $451.53;
9. That the periods of compensation listed in paragraph 6 were paid at the maximum compensation rate under the Virginia Workers' Compensation Act of $434.00. [ALJ #1].

ISSUES

I. Whether an employee involved in the maintenance of a steam and electrical power plant, whose primary purpose was to provide power for ship repair work at the Norfolk Naval Shipyard, is a "maritime employee" under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. (1994)?

II. Whether the claimant is entitled to temporary total disability for the periods of June 29, 1993 to August 22, 1993 and November 2, 1993 to November 28, 1993 for his injury of May 10, 1993 and from April 13, 1994 to May 12, 1994 for his injury of June 11, 1993?

FINDINGS OF FACT

1. Claimant is a 36 year old male who has been employed by Southeastern Public Service Authority of Virginia (SPSA/Employer) for approximately five years. [Tr.33-35].

2. SPSA is a public service authority created under the laws of Virginia. It is a regional waste management company in the Hampton Roads area of Virginia. [Tr. 18].

3. In the early 1980s, the United States decided to construct a power plant to provide steam and electricity to Norfolk Naval Shipyard (NNS), located in Portsmouth, Virginia.

4. The property upon which the power plant was built is immediately adjacent to NNS and is owned by the U. S. Navy. [Tr. 50, 51]. The address of the power plant is 3504 Elm Avenue, Portsmouth, Virginia. [EX 10]. The power plant is also owned by the U. S. Navy. [Tr. 28].

5. The power plant is separated from NNS by a privately owned railroad spur. [Tr. 27]. Chain link perimeter fences on either side of the spur separate the railroad spur from the power plant and NNS. SPSA's plant manager, Ronald Brown, noted that the primary reason for the fences was to isolate both Navy properties from the railroad spur. [Tr. 49]. However, no SPSA employee has access to NNS by virtue of being a SPSA employee. [Tr. 30]. He or she must either be badged or obtain special permission to enter before being permitted onto NNS. [Tr. 29]. Claimant has never had a pass or special permission to enter NNS. His duties were restricted to the power plant. [Tr. 21, 30, 31].

6. The power plant began operation in 1987. [EX 10]. In 1989, the U. S. Navy entered into a contract with SPSA, authorizing SPSA's operation and maintenance of the

power plant. [EX 10]. However, as previously stated, the U. S. Navy still owns the power plant and property.

7. The facility is designed to burn 1,500 tons of refuse daily, generating steam and electricity for NNS. Excess electrical power is sold to Virginia Power.[1] [Tr. 58]. SPSA collects, sorts, and moves the refuse fuel from its facility located several hundred yards to the west of the power plant on land owned by SPSA. [Tr. 53, 54]. All the steam generated by the power plant goes to the Shipyard and is used for heating and hot water for the shore facilities and ships being repaired at the Shipyard. [Tr. 29, 60, 61].[2] Steam is not used to run machinery at NNS. [Tr. 60].

8. Claimant was employed by SPSA as a boiler mechanic at the time of his injury. His job description at the power plant as a boiler mechanic indicates that:

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[1] SPSA has not control over how much electricity is sold to Virginia Power to be resold to its commercial customers. NNS controls the "grid" which determines how much, if any, surplus electricity is sold to Virginia Power. [Tr. 57-58].

[2] The low pressure heating steam sent to the Shipyard is referred to as "hotel services steam". [Tr. 60, 61].

> This is a technical position, involved in the maintenance, installation and repair of SPSA power plant equipment and machinery. . . . Performs required work for the maintenance and construction of plant buildings, structures and equipment, such as foundations, floors, walls, fences, doors, roofs, signs, walks, runways, plumbing, heating and ventilating systems, etc. Performs required work in the maintenance, installation and repair of plant equipment, such as boilers, pumps, compressors, turbines, condenses, heat exchanges, fuel handling equipment, hydraulic control systems, and all other plant mechanical equipment. Operates plant equipment, such as vehicles, cranes, hoists, etc. as needed [CX 5-1]. Claimant stated that this job description was accurate. [Tr. 34].

William Wrenn, a maintenance supervisor at SPSA testified:

A. Hr. Rodriguez was classified as a boiler plant mechanic II. He provided various functions in that designation.

He is considered to be a senior mechanic, knowledgeable in the repair and maintenance of boilers, turbines, pumps, other auxiliary equipment using varieties of tools, hand tools, and others.

Q. What is the purpose of the boilers?

A. The boiler is the vessel in which fuel is burned to convert water into steam, and that steam is thereby used to power auxiliary equipment, electrical generators, or, as earlier stated, in the use of hotel service steam.

Q. Okay. How about the turbines he repaired?

A. Currently located at the power plant are three General Electric turbines capable of producing approximately twenty megawatts each for a total plant generation of sixty megawatts.

Q. The steam and electricity that is produced by Southeastern Public Service, where does it go to?

A. It is currently used in Norfolk Naval Shipyard. In the case of the steam, for hotel services, and in the case of the electricity, the electricity's used in Norfolk Naval Shipyard for a variety of reasons and can be diverted to Virginia Power.

9. Claimant testified that on May 10, 1993, he suffered an injury while working for the Employer at the SPSA plant. [Tr. 36]. Claimant testified that on that occasion:

> We decided to try a new approach to cleaning our superheater which is part of the boiler, which involves a series of tubes which usually get clogged up with soot. And we use to manually scrape them, but at this time we went ahead and chose the idea of sandblasting. And the superheater, sir, it's tube here; it's tube back here. And we went in with hoses with flashlights attached to them and a flashlight on our hard hat. And we went

> in and done this for 12 or 14 hours a day continuously for over a week. And that's how I got injured.

[Tr. 37].

10. Claimant testified that following this injury, his hands felt like they were on fire. He reported the matter to his supervisor. [Tr. 37]. He then went to his family physician, Dr. Teer, who referred him to Dr. Hansen at the Neurological Clinic to diagnose what was wrong with his hands. [Tr. 37]. Subsequently, he went to Dr. Gold. [Tr. 38].

11. Dr. Gold first examined the Claimant on May 26, 1993. Subsequently, surgery was performed on each arm. Claimant was out of work from June 29, 1993 to August 22, 1993 and November 2, 1993 to November 28, 1993 because of the surgeries. [Stipulation 7; Tr. 38; CX 1-13, CX 1-14, CX 1-16 and CX 1-17].

12. Claimant also testified that on May 10, 1993, while sand blasting and manually scraping the superheater, he also suffered an elbow injury. [Tr. 37, 38, 41, 44; CX 1-3, CX 2-4]. On June 1, 1993, this condition was diagnosed as an

epicondylar bursitis by Dr. Hansen. [CX 2-11, 2-5]. Dr. Hansen opined that it was work related and caused by the sand blasting and scraping work. Dr. Gold was of the opinion that this injury was not related to Claimant's carpal tunnel problem. [CX 1-10 and 12]. However, Dr. Gold did believe that the elbow condition was a result of Claimant's work which caused stress on the elbow. [CX 1-10 and CX 1 - 11].

13. On April 13, 1994, Dr. Gold performed a decompression of the radial nerve for this elbow condition. Claimant remained out of work until May 12, 1994. [CX 1-11, CX 1-15 and CX 1-18]. Since that date, Claimant has continued to work his regular employment as a boiler mechanic. [Tr. 40].

CONCLUSIONS OF LAW

Jurisdiction/Coverage

Under the 1972 amendments of the Longshore Act, eligibility for compensation benefits pursuant to a work-related injury depends upon the results of two tests: "status" of the employee and "situs" of the injury. Northwest

Marine Terminals v. Caputo, 432 U.S. 249, 53 L. Ed. 2d 320, 97 S.Ct. 2348 (1977).

Situs (33 U.S.C. §903(a)

Claimant argues that the parties in the present case do not dispute that Claimant was injured on a maritime situs. Claimant maintains that the situs issue was clearly resolved regarding the exact power plant in question. In Prevetire v. Weher/Livsey Constructors, Inc., (Case No. 89-LHC-1851, March 28, 1990), an Administrative Law Judge found that the situs test had been satisfied. The Benefits Review Board did not address the situs issue and reversed the Judge on the status question only. Prevetire v. Weher/Livesey, Inc., (BRB No. 90-1181, May 12, 1990)(unpublished opinion) On appeal, the United States Court of Appeals for the Fourth Circuit noted "In the present case, there *is* no dispute that the situs test is satisfied." The Court of Appeals then went on to reverse the BRB on the status issue. Weher/Livsey Constructors, Inc. v. Prevetire, 27 F.3rd 985, 988 (4th Cir. 1994); 28 BRBS 57 , 61 (CRT)(1994).

Employer maintains that in the present case situs is still in issue and disputes that the location is an "adjoining

area customarily used by an employer...in repairing or building vessels." Section 902(4) of the Act.

Assuming arguendo that situs is in issue, the weight of the evidence shows that the situs test has been satisfied. The power plant itself was built by the U. S. Navy, is owned by the U. S. Navy, and is located on land owned by the U. S. Navy. This piece of Navy property is immediately adjacent to the Norfolk Naval Shipyard (NNS). The fact that the properties are separately fenced off is incidental especially since Employer's own witness conceded that the fences have more to do with separating the two Navy properties from a privately owned railroad spur than with separating the two Navy properties from each other. Moreover, the very purpose of the plant is to generate steam and electricity exclusively for NNS. NNS uses all the steam provider by the plant. Moreover, the Navy has exclusive control ever how much electricity produced by the plant will be used at NNS. SPSA has no control over how much, if any, electricity goes to the Virginia Power "grid" to be sold commercially.[3] SPSA

[3] I disagree with Employer that SPSA is in the nature of a public utility since some of the electricity is sold commercially. Unlike SPSA, a

merely operates and maintains the power plant which produces and sends steam and electricity directly to NNS to be used as the Navy sees fit at its ship repair facility. I conclude that despite fences and other restrictions, NNS has extended situs to the power plant, a place which produces steam and electricity to be used at NNS for ship repair and related purposes such as hotel services. The location of the plant does not appear to be fortuitous. Rather, it appears to be strategically located in an adjoining area so as to provide vital steam and electricity to NNS. Claimant has shown a distinct maritime nexus. Therefore, I conclude that situs test has been satisfied pursuant to 33 U.S.C. 903(a).

Status (33 U.S.C. §902 (3)

In Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 23 BRBS 96 (CRT)(1989), the United States Supreme Court held that landbased claimants at a relevant situs, engaged in activity that is an integral or essential part of loading or unloading a vessel, are covered under the LHWCA. The Court found that workers who are injured

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public utility controls the allocation of that which it produces. Here, the U. S. Navy appears to control the allocation of electricity.

while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. The shiploading process could not continue unless the equipment the claimants worked on was operating properly. Moreover, the BRB made it clear that fuel, water, steam and electricity are substances which are loaded onto ships. See Simonds v. Pittman Mechanical Contractors, 27 BRBS 120 (1993).

In the instant case, Claimant as a boiler mechanic, specifically maintained and repaired the equipment which produced the steam and electricity sent to NNS and loaded onto vessels being repaired there. I find that the Claimant was, therefore, engaged in an activity that was an integral and essential part of loading vessels. Thus, Claimant has established that he was "engaged in maritime employment" within the meaning of the Act, 33 U.S.C. § 902(3)

Period of Temporary Total Disability
Due to Carpal Tunnel Syndrome

Employer conceded that should jurisdiction be found under the Act, Claimant suffered a compensable injury to his wrists on May 10, 1993, and was entitled to compensation payments from June 29, 1993 to August 22, 1993 and

November 2, 1993 to November 28, 1993. Claimant was out of work during these periods due to carpal tunnel syndrome surgery to his wrists. I conclude that Claimant is entitled to compensation for these periods.

Periods of Temporary Total Disability due to An Elbow Injury

Section 20 provides that "[I]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary--(a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920.

The § 20 (a) presumption does not apply to aid the claimant in establishing his prima facie case. The claimant must establish a prima facie case by proving that he suffered coma hard or pain, Murphy v. SCA/Shayne Brothers, 7 BRBS 309 (1977), aff'd mem., 600 F.2d 280 (D.C. Cir. 1979), and that an accident occurred or working conditions existed which could have caused the harm. Kelaita v. Triple A Mach. Shop, 13 BRBS 326 (1981).

Once the claimant establishes a physical harm and working conditions which could have caused or aggravated the harm, the burden shifts to the employer to rebut the presumption with evidence that claimant's condition was not caused or aggravated by his working conditions. The employer must produce substantial evidence[4] to rebut the statutory presumption that the claim comes within the provisions of the Act. 33 U.S.C. § 920 (a). That evidence must be specific and comprehensive enough to sever the potential connection between the disability and the work environment. Parsons Corp. of California v. Director, 619 P.2d 39 (9th Cir. 1980).

Claimant testified that he first began an injury to his elbow while sandblasting and scraping the super heater during the second week of May 1993. Dr. Hansen, who diagnosed epicondylar bursitis on June 11, 1993, opined that it was work related. Moreover, he related the injury to the

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[4] Evidence will be considered substantial "if it is the kind of evidence a reasonable mind might accept as adequate to support a conclusion." John W. McGarth Corp. v. Hughes, 264 F.2d 314, 316 (2d Cir.), cert. denied, 360 U.S. 931, 79 S. Ct. 1451, 3 L.Ed.2d 1545 (1959); See In re: District of Columbia Workmen's Com Act, 554 F.2d 1075 (D.C. Cir.), cert denied, 429 U.S. 820, 97 S. Ct. 67, 50 L.Ed.2d 81 (1976).

sandblasting and scraping work which Claimant performed during the second week of May 1993. Claimant's treating physician, Dr. Gold, likewise opined that Claimant's elbow injury was work related, although not specifically related to Claimant's carpal tunnel syndrome problem. Dr. Gold felt the elbow condition was caused by stresses on the elbow. I find that the opinions of these two physicians are consistent and well reasoned. Moreover, I find the testimony of Claimant to be credible and supported by the medical opinion evidence of Drs. Gold and Hansen. Consequently, I find that Claimant has established a prima facie case that he suffered an elbow injury during a the second week of May 1993 and that working conditions existed which could have caused the harm. Thus, Claimant is entitled to the Section 20 (a) presumption that Claimant's injury was caused by his employment.

Employer has not presented any evidence to rebut the presumption that the elbow injury was caused by Claimant's employment. Consequently, I conclude that Claimant is entitled to temporary total disability benefits from April 13, 1994 to May 12, 1994 while he was out of work following his elbow surgery on April 13, 1994.

ORDER

1. The Employer is to pay Claimant compensation for temporary total disability from June 29, 1993 to August 22, 1993, November 2, 1993 to November 28, 1993 and April 13, 1994 to May 12, 1994 at the rate of $451.53 per week.

2. Employer shall receive credit for all compensation that has been paid.

3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

4. All computations are subject to verification by the District Director.

5. Pursuant to Section 7 of the Act, the Employer shall provide such medical treatment as the nature of the Claimant's work-related disability shall require.

6. Claimant's attorney, within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have 10 days to respond with objections thereto.

DANIEL A. SARNO, JR.
Administrative Law Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed: April 20, 1998

Nos. 97-1323, 97-705

KERBY

v.

SOUTHEASTERN PUBLIC SERVICE AUTHORITY

Nos. 97-1373, 96-716, 96-705

SOUTHEASTERN PUBLIC SERVICE AUTHORITY

v.

RODRIQUEZ

MANDATE

The judgment of this Court dated 2/24/98 takes effect today.

Patricia S. Connor
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed: April 20, 1998

SANDRA K. KERBY,

Petitioner,

v. Nos. 97-1323, 96-705

SOUTHEASTERN PUBLIC SERVICE AUTHORITY OF VIRGINIA; DIRECTOR, OFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

SOUTHEASTERN PUBLIC SERVICE AUTHORITY OF VIRGINIA,

Petitioner,

v.

SANDRA K. KERBY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ORDER

Southeastern Public Service Authority has filed a bill of costs.

The Court awards $80.00 in costs.

For the Court – By Direction

/s/ Patricia S. Connor

Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed: January 22, 1998

SOUTHEASTERN PUBLIC SERVICE AUTHORITY OF VIRGINIA,

Petitioner,

v.

SANDRA K. KERBY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ORDER

The respondent, William C. Rodriquez, has filed an unopposed motion to withdraw as a party to this appeal.

The Court grants the motion.

For the Court,

/s/ Patricia S. Connor

Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1322 (96-716)

Filed: April 3, 1997

WILLIAM C. RODRIQUEZ,

Petitioner,

v.

SOUTHEASTERN PUBLIC SERVICE AUTHORITY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

No. 97-1323 (96-705)

SANDRA K. KERBY,

Petitioner,

v.

SOUTHEASTERN PUBLIC SERVICE AUTHORITY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ORDER

Petitioners have filed motions to amend captions. The Court grants the motions to amend captions.

For the Court – By Direction

/s/ Patricia S. Connor

Clerk

APPENDIX I

U. S. DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

BRB NO. 96-705
CASE NO. 94-LHCA-5808
OWCP NO. 5-0093636

SANDRA K. KERBY

Claimant-Respondent

v. Date Issued: Dec. 10, 1996

SOUTHEASTERN PUBLIC SERVICE AUTHORITY,

Employer-Petitioner.

ORDER

Claimant has filed a Motion to dismiss Employer's Appeal for lack of jurisdiction. Claimant submits that employer has failed to comply with the jurisdictional requirements of 33 U.S.C. § 921 (a) and (b) by not paying for medical treatments as ordered by the Administrative Law Judge in its Decision and Order Granting Benefits dated February 9, 1996 and the Order dated August 7, 1996. Claimant argues that since no stay of payment of

benefits has been ordered by the Board, all compensation required by the award of benefits must be paid by the employer. Claimant requests that employer's appeal be dismissed. Employer has filed a Response to Claimant's Motion to Dismiss. Claimant has filed a reply thereto.

Claimant is advised that the Board has jurisdiction to consider employer's appeal of the Decision and Order Granting Benefits and the Order dated August 7, 1996. Employer has filed a timely appeal under Section 21 of the Act, and its alleged default is not grounds for dismissal. As no stay of payment has been granted under Section 21 (b) (3), employer's appeal does not relieve it of the obligation to pay benefits awarded by the administrative law judge. If employer does not do so, claimant's remedy lies with the District Director under 33 U.S.C. § 918. The Board lacks authority to declare employer in default of its obligation to pay an award of compensation. Pursuant to Section 18, and 20 C.F.R. 702.372 (a) of the regulations, in any case in which the employer or insurance carrier is in default in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is payable may, within 1 year after such default, apply in writing to the district director for a

supplementary compensation order declaring the amount of the default. The default order can only be enforced by the federal district court for the judicial district in which employer has its principal place of business, or maintains an officer, or in which the injury occurred. *See Providence Washington Insurance Co. v. Director, OWCP*, 765 F.2d 1381 (9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 1045 (5th Cir. 1983).

In light of the foregoing, claimant's motion to dismiss is denied.

Finally, in its Petition for Review and brief dated April 16, 1996, employer has requested that the Board consolidate this appeal with *William C. Rodriquez*, BRB No. 96-716 inasmuch as the jurisdictional issues in *Rodriquez* would be determinative of the jurisdictional issues in the instant case. The Board grants employer's motion and consolidates the instant case with BRB No. 96-716.

Claimant has filed a response to employer's Petition for Review and brief dated April 16, 1996. The briefing schedule in employer's original appeal is complete.

Employer, however, has failed to file a Petition for Review and brief in support of its supplemental appeal. Employer is directed to show cause within ten (10) days from receipt of this Order why its supplemental appeal should not be dismissed for failure to comply with the filing requirements of 20 C.F.R. § 802.211. 20 C.F.R. §§ 802.218 (b), 802.402.

Roy P. Smith
Administrative Appeals Judge

Nancy S. Dolder
Administrative Appeals Judge

Regina C. McGranery
Administrative Appeals Judge

Supreme Court, U.S.
FILED
JUL 24 1998
OFFICE OF THE CLERK

(2)

No. 97-1890

In the Supreme Court of the United States

OCTOBER TERM, 1997

SANDRA K. KERBY, PETITIONER

v.

SOUTHEASTERN PUBLIC SERVICE AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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10 pp

QUESTION PRESENTED

The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation and benefits to employees engaged in maritime employment who suffer injuries "upon the navigable waters of the United States * * * including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used" by an employer in specified longshoring and shipyard activities. 33 U.S.C. 903(a). The question presented is:

Whether a power plant that supplies steam and electricity exclusively to a shipyard is located in an "adjoining area" within the meaning of 33 U.S.C. 903(a), where the shipyard is separated from the plant by fences and a railroad spur, and employees of the plant are not routinely given access to the shipyard.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1890

SANDRA K. KERBY, PETITIONER

v.

SOUTHEASTERN PUBLIC SERVICE AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I-V) is unpublished, but the decision is noted at 135 F.3d 770 (Table). The decision of the Benefits Review Board (Pet. App. VI-XXVI) is reported at 31 Ben. Rev. Bd. Serv. (MB) 6. The decision of the administrative law judge (ALJ) (Pet. App. XXVII-XLIX) is unreported, although the determinative coverage issue, decided in *Rodriquez* v. *Southeastern Public Service Authority* (Pet. App. L-LXX), is reported at 30 Ben. Rev. Bd. Serv. (MB) 226 (ALJ).

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1998. The petition for a writ of certiorari was filed on May 22, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation to covered employees for work-related injuries that result in disability, and to survivors if the injury causes death. 33 U.S.C. 908, 909. A covered employee must meet a "status" requirement—*i.e.*, satisfy the Act's definition of "employee," see 33 U.S.C. 902(3)[1]—and have been injured at a maritime "situs." See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 264-265 (1977). The instant case concerns the "situs" requirement, which appears in Section 3(a) of the Act and which specifies that a disability or death is compensable only if it

> results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a).

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[1] Section 2(3) of the Act defines "employee," with certain exceptions not relevant here, as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3).

2. In the 1980s, the United States Navy built a power plant to provide steam and electricity to the Norfolk Naval Shipyard (NNS). Pet. App. LIV. The shipyard is located on land owned by the Navy that is contiguous with a navigable river. *Id.* at IX. The power plant is located on land, owned by the Navy, that is immediately adjacent to a landward side of the shipyard. *Id.* at IX, LV. A privately owned railroad spur separates the power plant from the shipyard, and chain link fences on either side of the spur separate the railroad spur from the Navy's two properties. *Id.* at LV.

In 1989, the Navy contracted with respondent Southeastern Public Service Authority to maintain and operate the power plant. Pet. App. III-IV, IX, LV-LVI. Respondent generates steam and electricity exclusively for the shipyard, which uses all of the steam and controls a "switch yard" on the power plant site that determines how much electricity the shipyard will use. *Id.* at X & n.2, LXIII. Respondent's employees need a badge or special permission to enter the shipyard, however, and therefore do not have immediate access to the shipyard by virtue of their employment with respondent. *Id.* at IV, XXIV, LV.

In *Rodriquez* v. *Southeastern Public Service Authority*, 30 Ben. Rev. Bd. Serv. (MB) 226 (ALJ) (1996), an administrative law judge (ALJ) determined that the power plant operated by respondent is a covered situs for purposes of the LHWCA. Pet. App. L-LXX. The ALJ concluded that the power plant is located on an "adjoining area customarily used by an employer * * * in repairing or building vessels" because the plant was built and is owned by the Navy, is located on land owned by the Navy, and is immediately adjacent

to the shipyard. *Id.* at LXII-LXIII (quoting 33 U.S.C. 903(a)). The ALJ stated that "[t]he fact that the [plant and shipyard] properties are separately fenced off is incidental." *Id.* at LXIII. The ALJ also observed that "the very purpose of the plant is to generate steam and electricity exclusively for" the shipyard, and that the Navy rather than respondent controls the flow of steam and electricity to the shipyard. *Ibid.* The ALJ concluded that NNS had "extended situs to the power plant," which was "strategically located in an adjoining area so as to provide vital steam and electricity to NNS." *Id.* at LXIV.

3. Petitioner was employed by respondent as a heavy equipment and crane operator at the power plant. Pet. App. XXXIII. In August 1994, she sustained a work-related injury. *Id.* at XI, XXXIII. She applied for disability benefits under the LHWCA, asserting that she met the status and situs requirements for coverage. *Id.* at IV. Relying on the decision in *Rodriquez*, the ALJ held that petitioner satisfied the Act's situs requirement. *Id.* at XXX-XXXI n.2. The ALJ also concluded that petitioner satisfied the LHWCA's status requirement and was otherwise eligible for benefits. See *id.* at XXXIX-XLIX; see also *id.* at LXIV-LXV (*Rodriquez* decision on status).

4. The Benefits Review Board reversed. Pet. App. XXI-XXVI. Although the Board affirmed the ALJ's determination that petitioner satisfied the LHWCA's status requirement, *id.* at XVI-XXI, it held that the injury for which compensation was sought had not occurred at a situs covered by the Act. Based on the Fourth Circuit's decision in *Sidwell* v. *Express Container Services, Inc.*, 71 F.3d 1134 (1995), cert. denied, 518 U.S. 1028 (1996), the Board held "that an

area is 'adjoining' navigable waters only if it is contiguous with or otherwise touches navigable waters." Pet. App. XXII. The Board stated that "the location of [a] railroad spur and the presence of two mutually exclusive fenced areas indicates that the two properties [*i.e.*, the shipyard and the power plant] are separate and distinct from one another." *Id.* at XXIV. The Board also noted that respondent's employees do not have immediate access to the shipyard but instead need a special pass or an escort. *Ibid.* Because the plant, as a separate and distinct piece of property, did not adjoin navigable waters, the Board held that petitioner's injury at the plant did not occur on a covered situs under the LHWCA. *Id.* at XXV.

5. The court of appeals affirmed. Pet. App. I-V. The court explained:

> While the parcel of property on which the power plant is located lies adjacent to NNS, and while NNS is located on land contiguous with the Southern Branch of the Elizabeth River, the parcel of land on which the power plant is located is not independently contiguous with that river or any other navigable waters. Moreover, the property on which the power plant is located is separated from NNS by a privately owned railroad spur, and by two chain-link fences, which surround the power plant and NNS respectively, and which separate the properties from the railroad spur, and from each other. [Respondent's] employees do not have access to NNS by virtue of their employment at the power plant.

Id. at IV. The court concluded that "this case is controlled by *Sidwell*," and that the Board had "correctly applied that precedent." *Id.* at V.[2]

ARGUMENT

The instant case presents essentially the same question as did the petitions for a writ of certiorari in *Sidwell* v. *Express Container Services, Inc.*, 71 F.3d 1134 (4th Cir. 1995), cert. denied, 518 U.S. 1028 (1996), and *Parker* v. *Director, OWCP*, 75 F.3d 929 (4th Cir.), cert. denied, 117 S. Ct. 58 (1996). The petitioners in both of those cases sought review of Fourth Circuit decisions holding that they had failed to satisfy the situs requirement for coverage under the LHWCA. In our briefs in opposition filed in those cases, we stated that if the Fourth Circuit's decisions were read to require strict contiguity between a particular place of business and navigable waters, they would create a conflict among the circuits and subvert the effective implementation of the LHWCA.[3] The government opposed the petitions, however, because we did not read the pertinent Fourth Circuit decisions to establish such a rigid rule, and because it was unclear whether other courts of appeals would have reached a different outcome based on the facts presented in those cases. For basically the same rea-

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[2] Because the court of appeals held that petitioner had failed to establish that her injury occurred at a situs covered by the LHWCA, it declined to determine whether (as the ALJ and Board had held) petitioner satisfied the Act's status requirement. Pet. App. V n.*.

[3] We have furnished counsel for the other parties in this case with copies of our briefs in opposition in *Sidwell* and *Parker*.

sons, the petition for a writ of certiorari in the instant case should also be denied.

1. The LHWCA provides for compensation only where the claimant can establish, *inter alia*, that a disability or death "results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or *other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).*" 33 U.S.C. 903(a) (emphasis added). Consistent with the views of the Director, Office of Workers' Compensation Programs (OWCP), the courts of appeals have generally held that a maritime facility may be covered by the underscored language in Section 903(a) even if it is not directly contiguous to navigable waters. See, *e.g.*, *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504, 513-515 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981); *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137, 141 (9th Cir. 1978) (Kennedy, J.); *Triguero* v. *Consolidated Rail Corp.*, 932 F.2d 95, 100-101 (2d Cir. 1991); see generally Gov't Br. in Opp. at 8-10 & n.5, *Sidwell* v. *Express Container Services*, No. 95-1569.

Construing the phrase "other adjoining area" in Section 903(a) to include a parcel of land that does not itself touch navigable waters is consistent with the statutory language. The term "area," which is not defined in the Act, is not limited to enumerated buildings or structures. See *Black's Law Dictionary* 106 (6th ed. 1990) ("[a]rea" means "[a] surface, a territory, a region * * * [a] particular extent of space or surface or one serving a special purpose"); *Nelson* v. *American Dredging Co.*, No. 96-3724, 1998 WL 231063, at *8-*9 (3d Cir. May 11, 1998). Thus, even if a

particular parcel of property does not itself touch navigable waters, it may properly be regarded as a situs covered by the Act if it is part of a larger "area" that does. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 281 (1977) (pier that is part of a terminal complex); *Sidwell* Gov't Br. in Opp. at 13 n.7 (quoting LHWCA Program Memorandum No. 58, at 10-11 (Aug. 10, 1977)); *Texports*, 632 F.2d at 515.[4]

Construing Section 903(a) in this manner is consistent with that Section's history and purposes, which indicate that the LHWCA's coverage may extend to a maritime facility that is not itself contiguous to navigable waters. See *Sidwell* Gov't Br. in Opp. at 13-15. That view is also consistent with the longstanding position of the Department of Labor's OWCP, as articulated most formally in LHWCA Program Memorandum No. 58, *supra*, at 10-11. By contrast, a rigid requirement that particular places of business be directly contiguous to navigable waters would "reenact the hard lines that caused longshoremen to move continually in and out of coverage * * * [and] frustrate the congressional objectives of providing uniform benefits and covering

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[4] Courts of appeals have also held that the term "adjoining" may be construed to mean "neighboring," so that even if a piece of property is viewed as a distinct "area," it need not directly touch navigable waters to be "adjoining." See *Texports*, 632 F.2d at 514; *Brady-Hamilton*, 568 F.2d at 141. Cf. *Empire Co.* v. *Occupational Safety and Health Review Comm'n*, 136 F.3d 873, 876, 878-879 & n.2 (1st Cir. 1998) (in applying safety regulation governing "wharves, bulkheads, quays, piers, docks and other berthing locations and adjacent storage or contiguous areas and structures," word "contiguous" could permissibly be construed to mean "nearby" as well as "touching") (citing *Texports*).

land-based maritime activity." *Texports*, 632 F.2d at 514-515.

2. As we explained in our brief in opposition in *Sidwell* (at 15-16), we do not believe that the Fourth Circuit has unambiguously articulated such a rigid rule. Although the court has unequivocally held that "an area is 'adjoining' navigable waters only if * * * it is 'contiguous with' or otherwise 'touches' such waters," *Sidwell*, 71 F.3d at 1138-1139, it has not adopted a precise definition of the term "area." The court has stated that "some notion of property lines will be at least relevant" in determining the scope of a covered "area," *id.* at 1140, but it has not held that a business's placement beyond the fence line of a maritime terminal would invariably exclude it from the coverage of Section 903(a). To the contrary, the court stated in *Sidwell* that it was "not certain * * * that the 1977 [OWCP] Memorandum contradicts our interpretation of the statute." *Id.* at 1141-1142; see also *id.* at 1140 n.11 (quoting LHWCA Program Memorandum No. 58, *supra*, at 10-11).[5]

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[5] As petitioner notes (Pet. 15-16), *Sidwell* stated that, to be an "other adjoining area" under Section 3(a) of the LHWCA, 33 U.S.C. 903(a), an area "must be a discrete shoreside structure or facility." 71 F.3d at 1139. The Third Circuit has correctly rejected that interpretation of "area" in holding that an undeveloped beach is an "other area" under Section 3(a). See *Nelson* v. *American Dredging Co.*, 1998 WL 231063, at *8-*9. The decision below does not depend upon application of that aspect of *Sidwell*, however, and it is not clear that that aspect of *Sidwell* was a holding. Review is also not warranted to correct possible inconsistencies among decisions within the Fourth Circuit. See Pet. 18-24. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Petitioner contends, based on the unpublished decision in the instant case, that "it is now clear that the Fourth Circuit's test is based solely on property boundaries, and places no relevance upon any functional relationship between the properties in question." Pet. 15. We agree that the "functional relationship" between two facilities is significant in determining whether they are properly regarded as parts of a single "area" that adjoins the water.[6] We do not believe, however, that the court of appeals in this case has treated functional considerations as irrelevant. The court did not base its decision solely on the fact that "the parcel of land on which the power plant is located is not independently contiguous with [the Elizabeth River] or any other navigable waters." Pet. App. IV. Rather, it also relied on the facts that "the property on which the power plant is located is separated from NNS by a privately owned railroad spur, and by two chain-link fences," and that "[respondent's] employees do not have access to NNS by virtue of their employment at the power plant." *Ibid.* Thus, to the extent that its holding depended on the lack of access of respondent's employees to

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[6] LHWCA Program Memorandum No. 58 explains that

> such facilities as "gear lockers"—buildings in which stevedoring equipment is maintained and stored (and sometimes fabricated)—may be located outside the fenced boundaries of a terminal. Such facilities are in practical fact integral parts of the maritime terminal, existing and being used solely for the loading and discharge of ships; they should be regarded as extensions of the terminals to which they relate. Hence, although they do not themselves adjoin the water, they are parts of terminal complexes which do, and are within the Act.

Id. at 11 (quoted in *Sidwell* Gov't Br. in Opp. at 11-12.)

NNS, the court of appeals in this case treated the "functional relationship" (Pet. 15) between the power plant and the shipyard as directly relevant to the question whether the power plant is a site covered by the LHWCA.

3. The disagreement between petitioner and the court of appeals centers not on *whether* the functional relationship between a particular workplace and shoreside facilities is relevant to the "situs" inquiry, but on what *type* of functional relationship is required. As we read the court of appeals' opinion in the instant case, its analysis turned on the fact that both NNS's personnel policies and the physical layout of the relevant properties minimized the extent to which workers would move about between the shipyard and power plant. Petitioner contends, by contrast, that the requisite functional relationship exists because the power plant is owned by the Navy and "provides steam and electricity for exclusive use by NNS at the terminal and on board ships." Pet. 17; see also Pet. App. LXIII (ALJ in *Rodriquez* concludes that the power plant is a covered situs because "the very purpose of the plant is to generate steam and electricity exclusively for NNS").

Although petitioner asserts (Pet. 17) that she "would have been covered under the Act upon application of the functional tests delineated by the other circuits," the decisions on which she relies did not involve factual settings comparable to that in the instant case. In each of those cases, the claimant himself moved regularly between a ship or shoreside facility and the workplace that was ultimately determined to be a covered situs under the LHWCA. See *Brady-Hamilton*, 568 F.2d at 139; *Texports*, 632 F.2d at 507; *Triguero*, 932 F.2d at 97, 101. Those factual

settings directly implicated the congressional concern that the LHWCA should not be implemented in such a manner as to cause longshore workers "to move continually in and out of coverage." *Texports*, 632 F.2d at 514. None of those decisions addresses the question whether the sort of functional relationship involved in this case—*i.e.*, the fact that the power plant is devoted exclusively to the production of steam and electricity for the shipyard—provides a sufficient basis for holding the plant to be a covered situs. Absent a clear conflict among the circuits, we continue to believe that the Fourth Circuit's analysis of the coverage question does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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